

No. 15820

United States
Court of Appeals
for the Ninth Circuit

BOSTON INSURANCE COMPANY, a corpora-
tion, Appellant,

vs.

HYRUM JENSEN, individually and doing busi-
ness as Eureka Lumber Company, Appellee.

Transcript of Record

(In Two Volumes)

Volume I.

(Pages 1 to 300, Inclusive)

Appeal from the United States District Court
for the Northern District of California,
Northern Division

FILED

FEB 25 1958

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Insurance Co.



In The Superior Court of the State of California
In and For The County of Humboldt

No. 32725

HYRUM JENSEN, individually and doing business as EUREKA LUMBER COMPANY,
Plaintiff,

vs.

BOSTON INSURANCE COMPANY, a corporation, DOES ONE to TEN, Defendant.

COMPLAINT FOR MONEY
DUE ON CONTRACT

Comes now the plaintiff above named, and for cause of action alleges as follows:

I.

That the plaintiff is a resident of the County of Humboldt, State of California, and has complied with all statutes regarding the filing and publication of certificate of doing business under a fictitious name; that the defendant is a corporation licensed and doing business as an insurance company, selling policies of fire insurance and contracts of fire insurance coverage within the State of California.

II.

That plaintiff on or about the 21st day of May, 1956, entered into a contract in writing with defendant wherein and whereby the defendant promised to pay to the plaintiff the sum of \$20,000.00

or such other lesser sum as the facts indicated upon a fire loss sustained by the plaintiff, which said contract is in the standard form fire insurance policy of the State of California and a true photostatic copy of which is set forth as Exhibit A annexed hereto and incorporated by reference herein as if fully set forth, being Boston Insurance Company Policy No. 560594, wherein and whereby the defendant obligated itself upon the occurrence of fire loss to the plaintiff to pay the sum of \$20,000.00 or such lesser sum as the loss would indicate.

III.

The plaintiff has fully performed each and every all and singular the covenants and conditions by him to be performed under and by virtue of the agreement as set forth as Exhibit A herein; that on or about June 25, 1956 in the City of Eureka, County of Humboldt, the stock and inventory of the plaintiff was lost and consumed by hostile fire, to the damage of plaintiff as hereinafter set forth and upon the occurrence of the said event and thereafter up to the filing of this complaint, the plaintiff has complied with and has performed each and every, all and singular the covenants and conditions set forth in the said contract attached hereto as Exhibit A by him to be performed, both before and after the occurrence of the said fire loss.

IV.

That after the said fire loss and on August 23, 1956, the plaintiff caused to be served upon the defendant a verified Proof of Loss on the form pre-

scribed by the defendant and containing all the information required to be contained by the said contract as set forth as Exhibit A, which said Proof of Loss demonstrated the loss by plaintiff in excess of the amount of \$20,000.00, which said Proof of Loss by true photostatic copy is set forth as Exhibit B hereto and incorporated herein by reference and made a part hereof as if wholly set forth.

V.

That more than sixty days have elapsed since the service of Proof of Loss upon the defendant herein and that within said time no statement has been received by plaintiff from defendant that there is a disagreement as to the amount of the said loss, and that the said plaintiff has, after serving notice of Proof of Loss upon defendant, demanded in writing that in the event of any disagreement by the defendant as to the amount of loss that the defendant forthwith appoint an appraiser as provided in Exhibit A herein and that the said defendant has failed, refused and neglected to appoint said appraiser and has failed and refused and neglected to indicate its disagreement to the Proof of Loss as set forth in Exhibit B; that under the terms of Exhibit A herein, there is due, owing and unpaid from the defendant to the plaintiff the sum of \$20,000.00 from and after October 22, 1956; that more than twenty days have elapsed since the demand of plaintiff that defendant appoint an appraiser and defendant has failed, refused and neglected to appoint any appraiser.

VI.

That the plaintiff has demanded of defendant that the same be forthwith paid and that the defendant has failed, refused and neglected to pay to the plaintiff the sum of \$20,000.00 as aforesaid although plaintiff has in every respect fully performed each and every, all and singular the covenants of the contract set forth as Exhibit A and defendant has failed, refused and neglected to perform any of the covenants thereof.

VII.

Wherefore, there is due, owing and unpaid to the plaintiff from the defendant the sum of \$20,000.00 together with interest from the 22nd day of October, 1956 at the rate prescribed by law, the same as a direct and proximate result of the failure, refusal and neglect of the defendant for \$20,000.00 plus interest from the 22nd day of October, 1956 at the rate prescribed by law, plus costs of suit herein, plus any and other relief as to the court seems indicated.

FREDERICK L. HILGER,
Attorney for Plaintiff.

Duly Verified.

[Endorsed]: Filed Dec. 31, 1956.

In The United States District Court, Northern
District of California, Northern Division

No. 7489 (Civil)

HYRUM JENSEN, individually and doing busi-
ness as EUREKA LUMBER COMPANY,
Plaintiff,

vs.

BOSTON INSURANCE COMPANY, a corpora-
tion, DOES ONE to TEN,
Defendants and Third Party Plaintiff,

vs.

HYRUM JENSEN and HAROLD DEE JEN-
SEN, Third Party Defendants.

THIRD PARTY COMPLAINT

With permission of the above entitled Court first had, by way of third party complaint, for cause of action against the above named third party defendants, Hyrum Jensen and Harold D. Jensen, third party plaintiff Boston Insurance Company (hereinafter referred to as "Company") alleges that:

1. That Hyrum Jensen and Eureka Lumber Company have filed a complaint against Company, and a true and correct copy of which is hereto attached as Exhibit "A".

2. At all times hereinafter mentioned Company

was, and still is, a corporation duly organized and existing according to the laws of the State of Massachusetts in the United States of America, and was, and still is, admitted to transact fire insurance business in the State of California, and has complied with the laws imposing conditions precedent to the transaction of such business in such State of California.

3. At all times hereinafter mentioned each of third party defendants was a resident of and resided in the County of Humboldt, State of California.

4. On or about the 29th day of May, 1956, Company executed and delivered to Eureka Lumber Company a California standard form of fire insurance policy with endorsements, covering stock all situate at the premises at the north side of 3rd Street, northwest corner of Commercial Street, Eureka, California.

5. Under the terms of such insurance contract, Company insured Eureka Lumber Company against all direct loss by fire except as otherwise therein provided to the extent of the actual cash value of the said stock at the time of loss, but in no event for more than the interest of Eureka Lumber Company and not to exceed the sum of \$20,000.00.

6. Said standard form of fire insurance policy provides that Company may require from Eureka Lumber Company an assignment of all right of recovery from any party for loss to the extent of the payment therefor is made by Company.

7. Company believes and therefore upon information and belief alleges that prior to the fire of June 25, 1956, at said premises said third party defendants Hyrum Jensen and Harold D. Jensen wilfully and with intent to injure, prejudice and damage Company, entered into a conspiracy to set fire to, and cause said stock to be burned.

8. Company believes and therefore alleges upon information and belief that on said 25th day of June, 1956, pursuant to such conspiracy said Hyrum Jensen and Harold D. Jensen wilfully, intentionally, negligently and carelessly caused and set fire to said stock thereby destroying said stock.

9. In the event Company is required to pay any sum under such insurance contract on account of said fire and loss caused by said acts by said Hyrum Jensen and Harold D. Jensen, by virtue of which Company is liable to said Eureka Lumber Company for damages, Company is entitled to a judgment against said third party defendants Hyrum Jensen and Harold D. Jensen for such sum.

10. This third party complaint is filed herein in order to determine in one action the respective rights and obligations of each of Company and said third party defendants and to avoid a multiplicity of actions, and that all of said rights and obligations arise out of and are related to the same transaction, and can be settled and determined by a judgment in this action.

Wherefore, Company prays judgment against

said third party defendants Hyrum Jensen and Harold D. Jensen for all sums that may be adjudged against said third party plaintiff in favor of said Eureka Lumber Company and/or Hyrum Jensen, for costs of suit and such other and further relief as is just and proper in the premises.

/s/ AUGUSTUS CASTRO,

Attorney for Defendant and Third Party Plaintiff
Boston Insurance Company.

[Endorsed]: Filed Jan. 4, 1957.

In The United States District Court, Northern
District of California, Northern Division

No. 7489 (Civil)

HYRUM JENSEN, individually and doing business as EUREKA LUMBER COMPANY,
Plaintiff,

vs.

BOSTON INSURANCE COMPANY, a corporation, et al.,
Defendants.

ANSWER TO COMPLAINT

Defendant Boston Insurance Company, a corporation, answers the complaint of plaintiff filed in the above entitled action, as follows:

First Defense

1. Defendant answers Paragraph I of said complaint, as follows:

Defendant admits that Hyrum Jensen was a resident of the State of California, and that defendant was, and is, a corporation organized and existing according to the laws of the State of Massachusetts in United States of America authorized and qualified to transact fire insurance business in the State of California.

Defendant denies each and every allegation in said Paragraph I not hereinbefore admitted.

2. Defendant answers Paragraph II of said complaint, as follows:

Defendant admits that the form of fire insurance policy in said Exhibit "A" is a California standard form of fire insurance policy.

Defendant denies each and every allegation in said Paragraph II not hereinbefore admitted.

3. Defendant answers Paragraph III of said complaint, as follows:

Defendant admits that on June 25, 1956, a fire occurred in a building at the location described in Exhibit "A" and that stock was damaged in such fire.

Defendant denies each and every allegation in said Paragraph III not hereinbefore admitted, and in this connection incorporates as a part hereof all of the allegations contained in the Second to Seventh Defenses, inclusive, hereinafter set forth.

4. Defendant answers Paragraph IV of said complaint, as follows:

Defendant admits that on August 24, 1956, it received a "Sworn Statement in Proof of Loss," dated August 22, 1956, in the form set forth in said Exhibit "B".

Defendant denies each and every allegation in said Paragraph IV not hereinbefore admitted, and in this connection denies that said Proof of Loss demonstrated a loss in excess of \$20,000.00, or in any part thereof, or at all.

5. Defendant answers Paragraph V of said complaint, as follows:

Defendant admits that more than 60 days elapsed after the receipt by it of said Sworn Statement in Proof of Loss; and, that after the expiration of said period of 60 days, while plaintiff Eureka Lumber Company was in default and had not complied with the provisions and stipulations of said insurance contract in said Exhibit "A", plaintiff requested an appraisal, and defendant has not appointed an appraiser.

Defendant denies each and every allegation contained in said Paragraph V not hereinbefore admitted, and in this connection denies that said sum of \$20,000 or any part thereof, is due, owing or unpaid by said defendant to plaintiff.

6. Defendant answers Paragraph VI of said complaint, as follows:

Defendant admits that plaintiff has demanded said sum of \$20,000.00 and that defendant has not paid the same, or any part thereof.

Defendant denies each and every allegation in said Paragraph VI not hereinbefore admitted, and in this connection incorporates as a part hereof said Second to Seventh Defenses, inclusive.

7. Defendant denies each and every allegation contained in Paragraph VII of said complaint, and in this connection denies that the said sum or any part thereof is due or owing to plaintiff.

Second Defense

1. Defendant alleges that said standard form of California fire insurance policy provides, in part, as follows:

(a) Lines 157-161 provide:

“Suit. No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy will have been complied with, and unless commenced within 12 months next after inception of the loss.”

(b) Lines 150-156 provide:

“When Loss Payable. The amount of loss for which this Company may be liable shall be payable 60 days after proof of loss, as herein provided, is received by this Company and ascertainment of the loss is made either by agreement between the insured and this Company expressed in writing or by filing with this Company an award as herein provided.”

(c) Lines 113-122 provide:

“Requirements in Case Loss Occurs:

“* * * the insured, as often as may be reasonably required, shall exhibit to any person designated by this Company all that remains of any property herein described, and submit to examination under oath by any person named by this Company and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.”

(d) Lines 11-24 provide:

“Perils not Included.

“This Company shall not be liable for loss by fire or other perils insured against in this policy caused, directly or indirectly, by; * * * (i) neglect of the insured to use all reasonable means to save and preserve the property at and after a loss when the property is endangered by fire from the neighboring premises;”

(e) Lines 28-31 provide:

“Conditions suspending or restricting insurance.

“Unless otherwise provided in writing added hereto this Company shall not be liable for loss occurring (a) while the hazard is increased by any means within the control or knowledge of the insured; * * *”

(f) Lines 1-6 provide:

“Concealment, Fraud.

“This entire policy shall be void if, whether before or after a loss, the insured has wilfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.”

On September 26, October 8 and 19, and November 7, 1956, pursuant to said lines 113-122, defendant requested plaintiff to exhibit to a representative of said defendant at the City of Eureka, all books of account, bills, invoices and other vouchers, or certified copies thereof, if the originals be lost, and copies of the income tax returns of Hyrum Jensen and Dee Jensen and/or Eureka Lumber Company for the calendar years 1953, 1954 and 1955.

Defendant alleges that in violation of said policy provisions, plaintiff refused to and did not produce prior to the commencement of this action, the following records:

(a) General ledger for the calendar years 1954, 1955 and 1956;

(b) Accounts receivable ledger;

(c) Combination cash and sales journal;

(d) All vendors invoices and statements for 1956;

(e) All sales invoices for 1956;

(f) All correspondence for 1956;

(g) All payroll records including the entire month of June, 1956;

(h) All cancelled checks of the Eureka Lumber Company for 1956;

(i) All bank statements together with cancelled checks of Harold D. Jensen for 1955 and 1956;

2. On October 8, 1956, pursuant to said policy lines 113-122 defendant requested said Dee Jensen, son of said Hyrum Jensen, to submit to an Examination Under Oath by its representative at the City of Eureka on October 12, 1956. Defendant alleges that in violation of said policy provisions, said Dee Jensen has refused to appear for such Examination Under Oath and plaintiff has refused to produce such Dee Jensen for such an Examination Under Oath prior to the commencement of this action.

Third Defense

1. Defendant re-alleges, re-adopts and re-affirms as a part hereof all of the allegations contained in Paragraph 1 of the foregoing Second Defense the same as if specifically set forth herein.

2. Defendant alleges that it is not liable for such loss because such loss, if any, was caused, directly or indirectly, by the neglect of plaintiff to use all reasonable means to save and preserve the property at and after such fire.

Fourth Defense

1. Defendant re-alleges, re-adopts and re-affirms as a part hereof all of the allegations contained in Paragraph 1 of the foregoing Second Defense the same as if specifically set forth herein.

2. Defendant alleges that it is not liable for such loss because the hazard of such loss, if any, was increased by means within the control and knowledge of plaintiff.

Fifth Defense

1. Defendant re-alleges, re-adopts and re-affirms as a part hereof all of the allegations contained in Paragraph 1 of the foregoing Second Defense the same as if specifically set forth herein.

2. Defendant alleges that after the alleged loss and damage and before the commencement of this action, in violation of said policy lines 1-6, Hyrum Jensen wilfully concealed, misrepresented and swore falsely and fraudulently concerning the following material facts and circumstances:

(a) In said Proof of Loss and in an Examination Under Oath, said Hyrum Jensen stated that the cause and origin of said fire was unknown to him; whereas, in fact, the cause and origin of said fire were known to him.

(b) In said Proof of Loss and said Examination Under Oath, said Hyrum Jensen stated that the cash value of said property at the time of loss was \$63,549.54 and that the whole loss and damage was \$33,549.54; whereas, in fact, Hyrum Jensen knew that neither said cash value of said property nor said loss and damage was in said amounts.

(c) In said Proof of Loss and said Examination Under Oath, said Hyrum Jensen stated that at the time of the loss that the interest of Eureka Lum-

ber Company in the property described was entire, and no other person had any interest therein; whereas, in fact, he knew that others than the Eureka Lumber Company had an interest in said property.

(d) In said Proof of Loss and said Examination Under Oath, said Hyrum Jensen stated that since said policy was issued there was no change of interest in the property described; whereas, in fact, he knew that the changes of interest had occurred.

(e) In said Proof of Loss and said Examination under Oath, said Hyrum Jensen stated that since said policy was issued there had been no change in the exposure of said property; whereas, in fact, he knew that a change had occurred in the exposure of said property.

(f) In said Examination Under Oath, said Hyrum Jensen denied that said Dee Jensen, also known as and called Harold D. Jensen, had an interest in said property; whereas, in fact, he knew that said Dee Jensen had an interest in said property. Each of said statements made by said Hyrum Jensen was false and fraudulent and made with the intent to induce defendant to pay said sum of \$20,000.00.

Sixth Defense

1. Defendant re-alleges, re-adopts and re-affirms as a part hereof all of the allegations contained in Paragraph 1 of the foregoing Second Defense the same as if specifically set forth herein.

2. Defendant alleges that it is informed and believes and therefore alleges:

(a) That prior to the fire on June 25, 1956, said Hyrum Jensen and Harold D. Jensen entered into a conspiracy to falsify and puff up the value of said stock, and thereafter to cause such stock to be burned with the intent to defraud defendant of said amount of insurance.

(b) That pursuant to said conspiracy, on or about June 25, 1956, said Hyrum Jensen and said Harold D. Jensen wilfully set fire to and caused said stock to be burned.

(c) That pursuant to said conspiracy on August 24, 1956 said Hyrum Jensen delivered to said defendant said false and fraudulent sworn statements in said Proof of Loss and damage and in said Examination Under Oath as set forth in said Fifth Defense.

(d) That pursuant to said conspiracy and after said fire and before the commencement of this action, said Hyrum Jensen refused to produce said records set forth in said Second Defense, and said Hyrum Jensen refused to produce and said Dee Jensen refused to appear for said Examination Under Oath.

Seventh Defense

Said defendant is informed and believes and therefore alleges that said Harold D. Jensen is a real party in interest herein, and can be made a party without depriving this Court of jurisdiction

of the present parties, and has not been made a party.

Wherefore, said defendant prays that said plaintiff take nothing and defendant recover its costs of suit herein and for such other and further relief as is just and proper in the premises.

/s/ AUGUSTUS CASTRO,
Attorney for Defendant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed January 7, 1957.

[Title of District Court and Cause.]

ANSWER TO THIRD-PARTY COMPLAINT

Comes now the Third Party Defendant, Hyrum Jensen, and by way of Answer to the Third Party Complaint on file herein, denies, avers and alleges as follows:

I.

Admits the allegations contained in Paragraph I of the said Third Party Complaint.

II.

Has no information or belief respecting the allegations of Paragraph II of the said Third Party Complaint.

III.

Admits the allegations of Paragraph III of the Third Party Complaint.

IV.

Admits the allegations of Paragraph IV of the said Third Party Complaint.

V.

Admits the allegations of Paragraph V of the said Third Party Complaint.

VI.

Admits the allegations contained in Paragraph VI of the said Third Party Complaint.

VII.

Denies, each and every, all and singular, conjunctively and disjunctively, the allegations set forth in Paragraph VII of the said Third Party Complaint.

VIII.

Denies, each and every, all and singular, conjunctively and disjunctively the allegations of Paragraph VIII of the said Third Party Complaint.

IX.

Denies each and every, all and singular, conjunctively and disjunctively, the allegations contained in Paragraph IX of the said Third Party Complaint by virtue of the foregoing denials of the allegations of Paragraphs VII and VIII of the said Third Party Complaint.

Wherefore, Third Party Defendant Hyrum Jensen, having fully answered the said Third Party Complaint on file herein by the Boston Insurance Company, prays that the Boston Insurance Company take nothing by its Third Party Complaint

and that the Third Party Defendant be dismissed hence together with his costs of suit and for such other and further relief as is just and proper in the premises.

/s/ FREDERICK L. HILGER,
Attorney for Third Party
Defendant, Hyrum Jensen.

Affidavits of Service by Mail Attached.

[Endorsed]: Filed January 22, 1957.

[Title of District Court and Cause.]

ANSWER TO THIRD-PARTY COMPLAINT

Comes now the Third Party Defendant, Harold D. Jensen, and by way of Answer to the Third Party Complaint on file herein, admits, denies, and alleges as follows:

I.

Admits the allegations contained in Paragraph I of the said Third Party Complaint.

II.

Has no information or belief respecting the allegations of Paragraph II, of the said Third Party Complaint.

III.

Admits the allegations of Paragraph III of the Third Party Complaint.

IV.

Admits the allegations of Paragraph IV of the said Third Party Complaint.

V.

Admits the allegations of Paragraph V of the said Third Party Complaint.

VI.

Admits the allegations contained in Paragraph VI of the said Third Party Complaint.

VII.

Denies, each and every, all and singular, conjunctively and disjunctively, the allegations set forth in Paragraph VII of the said Third Party Complaint.

VIII.

Denies, each and every, all and singular, conjunctively and disjunctively the allegations of Paragraph VIII of the said Third Party Complaint.

IX.

Denies, each and every, all and singular, conjunctively and disjunctively, the allegations contained in Paragraph IX of the said Third Party Complaint by virtue of the foregoing denials of the allegations of Paragraphs VII and VIII of the said Third Party Complaint.

Wherefore, Third Party Defendant Harold D. Jensen, having fully answered the said Third Party Complaint on file herein by the Boston Insurance Company, prays that the Boston Insurance Company take nothing by its Third Party Complaint and that the Third Defendant be dismissed hence together with his costs of suit and for such other

and further relief as is just and proper in the premises.

/s/ ROBERT W. HILL,

Attorney for Third Party

Defendant, Harold D. Jensen.

Affidavits of Service by Mail Attached.

[Endorsed]: Filed January 24, 1957.

[Title of District Court and Cause.]

PROPOSED INSTRUCTIONS REQUESTED
BY DEFENDANT AND THIRD PARTY
PLAINTIFF BOSTON INSURANCE COM-
PANY

* * * * *

Defendant's Instruction No. 3

Compliance With Conditions Precedent Required

The standard California fire insurance policy provides that:

"No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy will have been complied with, * * *"

In its answer, defendant has set forth that plaintiff did not comply with the following requirements of the standard California fire insurance policy in that such policy provides as follows:

"The insured, as often as may be reasonably required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under

oath by any person named by this company, and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this company or its representatives, and shall permit extracts and copies thereof to be made."

When an insured has failed to comply with the requirements of the policy which require him to produce said bills, invoices and other vouchers, or copies thereof if the originals be lost or fail to submit to an examination under oath, the failure either to produce such documents or submit to such Examination Under Oath constitutes a complete defense to any action on the policy.

Hickman v. London Assurance Co. (1920) 184 Cal. 524; 195 P 45—failure to submit to examination under oath; *Baldwin v. Bankers & Shippers Ins. Co.* (1955 Cir. 9th) 222 Fed. 2d 953. *Seivel v. Lebanon Mutual Ins. Co.* (1900) 46 Atl. 851—failure to produce books and documents. *Robinson v. National Automobile Ins. Co.* (1955) 132 C. A. 2d 909, 712; 282 P2d 930—failure to answer questions in out of sight loss.

Defendant's Instruction No. 4

Burden of Proof

An insurer is not liable except upon proof that the loss has occurred within the terms of the policy and the burden of proof is upon the insured to

prove that he has performed the conditions of the policy.

Rizzutto v. National Reserve Ins. Co. (1949) 92 C. A. 2d 143; 206 P 2d 431, 432.

Defendant's Instruction No. 5

Meaning of "Shall"

As used in the Insurance Code of the State of California, and in the parts of the policy that are hereafter read to you in my instructions, the word "shall" is mandatory unless otherwise apparent from the context.

Ins. C. 16; Ins. C. 2071 re: (1) Concealment, fraud; (2) Perils not included; (3) Conditions suspending or restricting insurance; (4) Requirements in case loss occurs; (5) Suit; *Carninetti v. Superior Court* (1941) 16 Cal. 2d 838, 108 P 2d 911.

Defendant's Instruction No. 6

Perils Not Included

The California standard fire insurance policy provides:

"This company shall not be liable for loss by fire or other perils insured against in this policy caused * * * by: (i) neglect of the insured to use all reasonable means to save and preserve the property at and after a loss, * * *; (j) nor shall this company be liable for loss by theft."

See: Policy Lines 7-24.

* * * * *

Defendant's Instruction No. 8

Policy Void for Concealment or Fraud

The California standard fire policy provides:

“This entire policy shall be void if, whether before or after a loss, the insured has wilfully concealed or misrepresented any material fact or circumstances concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.”

Defendant's Instruction No. 9

Conspiracy Defined

A conspiracy is a combination of two or more persons to accomplish by concerted action a criminal or unlawful purpose, or a lawful purpose by a criminal or unlawful means.

Parkinson Co. v. Building Trades Council (1908) 154 Cal. 581; 98 P 1027.

Defendant's Instruction No. 10

Unlawful Acts

It is unlawful for any person to wilfully and with intent to injure or defraud an insurer either to commit fraud as defined in my instruction hereafter or set fire.

Penal Code 448 subd. (a); 450 Subd. (a); 548.

Defendant's Instruction No. 11

Conspiracy: Express Agreement

It is not necessary that two persons should meet together and enter into an explicit or formal agreement to commit the unlawful end, or that the conspiracy should be expressed in words. The law fixes no time at which a conspiracy must have been entered into, and, it may be added, it does not provide that a conspiracy have any particular duration. If,

in any manner the conspirators tacitly come to a mutual understanding to commit an unlawful end it is sufficient to constitute a conspiracy, that is, a conspiracy may result from the actions of the conspirators in mutually carrying out a common purpose to achieve an unlawful end.

People v. Montgomery (1941) 47 C. A. 2d 1; 117 P 2d 437.

Defendant's Instruction No. 12

Proof of Conspiracy by Circumstantial Evidence

A conspiracy is almost always of necessity provable only by circumstantial evidence, that is to say, by inference reasonably deduced from facts proven, and this is so because the law recognizes the intrinsic difficulty of establishing a conspiracy by direct evidence. Consequently, the conspiracy complained of may often times be inferred from the nature of the acts complained of, the individual and collective interests of the alleged conspirators, the situation and relation of the parties at the time of the commission of the act, and generally all of the circumstances preceding and attending the culmination of the claimed conspiracy.

Consequently, all of the circumstances preceding and surrounding the origin of the fire of June 25, 1956, as well as the aftermath to the fire, may be considered by you in determining whether plaintiff or cross-defendant wilfully entered into such conspiracy, or concealed, misrepresented or committed any fraud concerning this fire.

People v. Arnold (1942) 53 C. A. 2d 11; 127 P 2d

285; *People v. Kessler* (1944) 62 CA 2d 817, 823; 145 P 2d 656; *Siemon v. Finkle* (1923) 190 Cal. 611, 615; 213 P 954; *Johnson v. Morris* (1930) 210 Cal. 580, 590; 213 P 954.

Defendant's Instruction No. 13
Conspirators Liable for All Acts

When a conspiracy has been established, the act of one conspirator in furtherance of the common purpose is the act of all the conspirators; and each conspirator is equally liable for all the consequences of the conspiracy, even though they did not know the details of the scheme from its inception and regardless of the extent of their participation or the share of the moneys obtained by them.

State v. Gray (1946) 76 C. A. 2d 536; 173 P 2d 399; *Anderson V. Thacher* (1946) 76 C. A. 2d 50; 172 P 2d 553; *Mox Inc. v. Woods* (1927) 202 Cal. 675; 262 P 302.

* * * * *

Defendant's Instruction No. 15
Misrepresentation Material

Every misrepresentation is material if it influences an insurance company in paying a loss.

See: *Columbia Ins. Co. v. Lawrence* 9 L. Ed. 512 (U. S. Supreme Court 1936); *Air Chase Inc. v. National Surety Co.* (1931) S.D. NY 49 Fed. 2d 447; *Wallace v. World Fire & Marine Ins. Co.* (1947 SD cl) 70 Fed. Supp. 193 (affirmed 166 Fed. 2d 571); *Bennett v. Northwestern Nat. Ins. Co.* (1927) 84 Cal. App. 130.

* * * * *

Defendant's Instruction No. 17

Overstatements—Not Opinion

When one having a special knowledge of the property swears under oath that such property has an excessive value to one ignorant on the subject with unequal means of information, then such statement of excessive values is not a mere matter of opinion but is made with the intent that the addressee should rely on it to his injury.

Orenstein v. Star Insurance Company (10 Fed. 2d 1054); Hyland v. Millers Nat. Ins. Co. (C.C.A. 9th, 1937) 91 F 2d 735, 742.

Defendant's Instruction No. 18

Concealment—Definition

Neglect to communicate that which an insured knows and ought to communicate to an insurer is concealment.

See: Insurance Code 330.

Defendant's Instruction No. 19

Concealment—Intent

A concealment of fact, whether intentional or unintentional, which is material to the risk voids the policy. The presence of an attempt to deceive is not required to void the policy.

Gates v. General Casualty Co. of America (1941 9th Cir.) 120 Fed. 2d 925, 927; Hogel & Co. v. U. S. Fidelity & Guarantee Co. (1939) 35 C. A. 2d 171, 181; 94 P 2d 1046.

Defendant's Instruction No. 20

Disclosures Required

Every party to a contract of insurance shall com-

municate to the other, in good faith, all facts within his knowledge which are or which he believes to be material to the contract and as to which he makes no warranty, and which the other has not the means of ascertaining.

Ins. Code 332.

Defendant's Instruction No. 21

Concealment—Materiality

Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contracts for making his inquiries.

Ins. Code 334.

Defendant's Instruction No. 22

Highest Good Faith

An insurance policy is a contract with the highest good faith, and it requires the exercise of good faith by the parties to the contract; if plaintiff in making his claim under this policy of insurance, for the purpose of exaggerating said claim, wilfully, knowingly, and intentionally for the purpose of recovering more than he is entitled to, made a substantial exaggeration in the amount of such claim, then the policy of insurance is void and insured is entitled to no recovery thereunder.

Fire Ins. Co. v. Merrick, 171 Maryland 476, 491; Tru-Fit Clothes v. Underwriters of Lloyds (1957 9 Fire and Cas. Cases 271, 272).

* * * * *

Defendant's Instruction No. 24

Burden of Proving Concealment, Fraud or Arson

While the burden of proving concealment, misrepresentation or fraud on the part of the plaintiff to void such policy is upon the defendant, the law does not require demonstration, that is, such degree of proof as, excluding possibility of error, produces absolute certainty, because such proof is rarely possible, as concealment, misrepresentation or fraud are usually planned and executed with stealth and secrecy. In a civil action it is proper to find that defendant has succeeded in carrying its burden of proof on the issue of concealment, misrepresentation or fraud if the evidence favoring their side of the question is more convincing than that tending to support the contrary side, and if it causes you to believe that on that issue the probability of truth favors the defendant.

Concealment, misrepresentation or fraud as to the origin of a fire is provable by circumstantial evidence, that is, by inference reasonably deduceable from facts proven, and this is so because the law recognizes the intrinsic difficulty of establishing such a concealment, misrepresentation or fraud by direct evidence, as a person who sets a fire to a building usually plans and executes his plan with stealth and secrecy. Consequently all of the circumstances preceding and surrounding the origin of the fire of June 25, 1956, as well as the aftermath to the fire, may be considered by you in determining whether plaintiff has wilfully concealed, misrepresented or committed any fraud concerning this fire.

* * * * *

Defendant's Instruction No. 36

No Recovery for Two Electric Motors

You are instructed that in no event can plaintiff recover anything for the two (2) electric motors listed in the Proof of Loss.

See: I—Par. "8. Excess Insurance of Building, Equipment and Stock Form.

II—Expert evidence to show: Such motors were insured by Hills & Morton, Inc., a corporation which was the sole owner of each motor, with the American National Fire Insurance Company under its policy #151093, effective June 12, 1956, for one year. American National Insurance Company paid Hills & Morton, Inc. for such motors on February 17, 1957, by its draft.

Defendant's Instruction No. 37

No Coverage for Equipment

Plaintiff did not insure himself for damage to Equipment, but only insured against damage to Stock as defined in my instructions. In no event can plaintiff be awarded damages for the loss of Equipment.

See: Exhibit 1—Policy of Insurance, re: Coverage on Equipment "NIL".

See: Paragraph 2 (Item II. Equipment Coverage) of Building, Equipment and Stock Form attached to Policy.

Defendant's Instruction No. 38

Definition of Stock Coverage

When the insurance under this policy covers Stock, such insurance shall cover on stock of goods,

wares and merchandise of every description, manufactured, unmanufactured, or in process of manufacture; materials and supplies which entered into the manufacture, packing, handling, shipping and sale of same; advertising materials; all being the property of the named insured, or sold but not removed (it being understood that the value of stock sold but not removed shall be the insured's selling price and that such value shall be considered as actual cash value in the application of any clauses forming a part of this policy).

See: Paragraph 2 (Item III Stock Coverage) of Building, Equipment and Stock Form Endorsement attached to Exhibit 1.

[Endorsed]: Filed October 1, 1957.

[Title of District Court and Cause.]

VERDICT

We, the Jury, find in favor of the Plaintiff and assess the damages against the Defendant in the sum of Twenty Thousand Dollars (\$20,000.00).

/s/ HELMER G. BENSON,
Foreman.

[Endorsed]: Filed October 1, 1957.

In the United States District Court, Northern
District of California, Southern Division

No. 7489-Civil

HYRUM JENSEN, individually and doing business as EUREKA LUMBER COMPANY,
Plaintiff,

vs.

BOSTON INSURANCE COMPANY, a corporation,
Defendant.

JUDGMENT ON VERDICT

This cause having come on regularly for trial on September 24, 1957, before the Court and a Jury of twelve persons duly impaneled and sworn to try the issues joined herein; Frederick L. Hilger, Esq., appearing as attorney for the plaintiff and Augustus Castro, Esq., and Thomas Hartwell, Esq., appearing as attorneys for the defendant, and the trial having been proceeded with on September 24, 25, 26, 27, 30 and October 1, in said year, and oral and documentary evidence on behalf of the respective parties having been introduced and closed, and the cause, after arguments by the attorneys and the instructions of the Court having been submitted to the Jury and the Jury having subsequently rendered the following verdict, which was ordered recorded, viz: "We, the Jury, find in favor of the Plaintiff and assess the damages against the Defendant in the sum of Twenty Thousand Dollars (\$20,000), Helmer G. Benson, Foreman" and the Court having ordered

that judgment be entered herein in accordance with said verdict, with interest at the rate of 7% thereon from October 22, 1956 through October 1, 1957, and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that said plaintiff do have and recover of and from said defendant the sum of Twenty Thousand and No/100 (\$20,000.00) Dollars, together with interest at the rate of 7% from October 22, 1956 through October 1, 1957 in the sum of One Thousand Three Hundred Thirty-eight and 60/100 (\$1,338.60) Dollars, together with his costs herein taxed in the sum of \$303.30.

Dated: October 2, 1957.

/s/ C. W. CALBREATH,
Clerk.

[Endorsed]: Filed October 2, 1957.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR JUDGMENT NOT-
WITHSTANDING VERDICT, AND IN
THE ALTERNATIVE MOTION FOR NEW
TRIAL

To: Hilger & Thomas, Attorneys for Plaintiff and
Third Party Defendants, Hyrum Jensen and
Harold Dee Jensen:

Take Notice that the undersigned will bring the
above Motion on for hearing before this Court at

the United States Post Office Building, City of San Francisco, State of California, on the 25th day of October, 1957, at 10:00 a.m., or as soon thereafter as counsel can be heard.

Dated: October 11, 1957.

/s/ AUGUSTUS CASTRO,
Attorney for Defendant and
Third Party Plaintiff.

[Title of District Court and Cause.]

MOTION OF DEFENDANT AND THIRD
PARTY PLAINTIFF FOR JUDGMENT
NOTWITHSTANDING VERDICT, AND IN
THE ALTERNATIVE MOTION FOR NEW
TRIAL

Defendant and Third Party Plaintiff (hereinafter referred to as "Defendant") hereby moves the Court, as follows:

I. Under Rule 50 of the Federal Rules of Civil Procedure to have the verdict and judgment entered heretofore in the above entitled action in favor of plaintiff and third party defendant set aside, and to have judgment entered in accordance with the Motion for Directed Verdict made by defendant at the close of all the evidence. Exhibit "A" hereto attached and hereby made a part hereto is a draft of the proposed order requested by defendant.

The Motion is made upon the Notice attached

hereto and upon all the records and files in such action, including all of the testimony, all exhibits in the proceedings had upon the trial of such action.

The Motion is made upon the grounds that at the close of all the evidence, defendant made a Motion for a Directed Verdict which should have been granted, but which was denied. Further, such Motion is made upon all of the grounds heretofore stated as grounds for said Motion of a Directed Verdict; and upon each of the following grounds:

(a) Under the uncontradicted evidence defendant established as a matter of law that it was entitled to a judgment, because the plaintiff did not comply with all the requirements of the subject policy in that, first, under the policy, defendant requested that plaintiff produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof, if originals be lost, at the City of Eureka, California, on October 12, 1956, and to permit extracts and copies thereof to be made; and prior to the trial of such action plaintiff did not produce any books of account, except cash book, bills, invoices or other vouchers for the calendar year 1956, supporting the "out of sight" loss. It was the uncontradicted evidence of Ellen Van Harpen, bookkeeper for plaintiff, for more than one year immediately preceding and at the time of said fire, that there were complete books of account and invoices, and that after the fire such books of account and invoices were legible and useable.

(b) Under the terms of the subject policy, defendant requested Harold Dee Jensen to submit to an Examination Under Oath in the City of Eureka, on October 12, 1956, and subscribe the same, that after receiving notice of such request Harold Dee Jensen, who was either a part owner of the named insured Eureka Lumber Company or an employee thereof, refused to appear for an Examination Under Oath.

II. In the event the foregoing Motion for Judgment Notwithstanding the Verdict is denied, then, in the alternative, defendant hereby moves this court under Rule 59 of the Federal Rules of Civil Procedure to vacate and set aside said verdict and judgment and grant defendant a new trial. Exhibit "B" hereto attached and hereby made a part hereof is a draft of the proposed order for new trial.

The Motion for New Trial is made upon the Notice of Motion attached hereto and upon all the records, papers and files herein including the testimony and proceedings had upon the trial of this action and the exhibits introduced in evidence marked for identification, including the instructions of the Court, rulings of the Court and instructions proposed by defendant.

Such Motion is made upon each of the following grounds:

- (a) Verdict is against the law;
- (b) Verdict is against the weight of evidence;
- (c) Verdict is contrary to the evidence;
- (d) The evidence is insufficient to sustain the verdict;

(e) Errors of law occurring at the trial duly objected and excepted to, including instructions given by the Court and the refusal of the Court to give instructions proposed by defendant to which denial defendant duly excepted, and rulings upon the admission of evidence.

Dated: October 11, 1957.

/s/ AUGUSTUS CASTRO,
Attorney for Defendant and
Third Party Plaintiff.

[Title of District Court and Cause.]

EXHIBIT "A"
ORDER

Defendant and Third Party Plaintiff Boston Insurance Company having duly moved the above entitled Court to vacate and set aside the verdict and judgment heretofore rendered in favor of plaintiff and third party defendant Hyrum Jensen, and against said defendant and third party plaintiff and having moved the Court to render and enter judgment in accordance with its Motion for a Directed Verdict heretofore made, and the matter having been heard and submitted to the Court, and the parties having appeared upon the making and hearing of said Motion, and the Court being fully advised, it is hereby ordered, adjudged and decreed:

1. That the verdict and judgment herein be, and they are hereby vacated and set aside, and judgment against said plaintiff and third party defendant and

in favor of defendant and third party plaintiff Boston Insurance Company be entered in accordance with defendant's Motion for Directed Verdict heretofore made;

2. That said plaintiff and third party defendant take nothing and that defendant and third party plaintiff Boston Insurance Company have and recover its costs of suit herein.

Done in Open Court this.....day of....., 1957.

.....,
Judge of the United States
District Court.

[Title of District Court and Cause.]

EXHIBIT "B"

ORDER

Defendant and Third Party Plaintiff Boston Insurance Company having duly moved the above entitled Court in the alternative, to vacate and set aside the verdict and judgment herein heretofore rendered in favor of plaintiff and third party defendant Hyrum Jensen and against defendant and third party plaintiff, and the matter having been heard and submitted to the Court, and the parties having appeared in the making and hearing of said Motion, and the Court being fully advised, it is hereby ordered, adjudged and decreed:

1. That such verdict and judgment be, and they are hereby vacated and set aside, and a new trial of this action is hereby granted to defendant and third party plaintiff Boston Insurance Company.

Done in Open Court thisday of.....,
1957.

.....,

Judge of the United States
District Court.

Certificate of Service by Mail Attached.

[Endorsed]: Filed October 11, 1957.

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Friday, the 25th day of October, in the year of our Lord one thousand nine hundred and fifty-seven.

Present: The Honorable Louis E. Goodman, District Judge.

Civ. 7489

[Title of Cause.]

This case came on regularly this day for a hearing on the motion for judgment notwithstanding the verdict, or in the alternative for a new trial. Frederick L. Hilger, Esq., was present for and on behalf of the plaintiff. Augustus Castro, Esq., was present for and on behalf of the defendant. After hearing counsel, it is Ordered that the motion for judgment notwithstanding the verdict, or in the alternative for a new trial be and the same is hereby Denied. It is further Ordered that the defendant have a 10 day stay of execution.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that defendant and third party plaintiff, Boston Insurance Company, a corporation, hereby appeals to the United States Court of Appeals for the 9th Circuit from the judgment entered of record in the office of the Clerk of the above entitled Court on October 2nd, 1957 in favor of the plaintiff and third party defendant and against said defendant and third party plaintiff.

Dated this 4th day of November, 1957.

/s/ AUGUSTUS CASTRO.

[Endorsed]: Filed Nov. 4, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in this Court in the above-entitled case, and that they constitute the record on appeal herein as designated by the defendants.

Petition for removal, together with a copy of the complaint and summons.

Answer to complaint.

Third party complaint.

Answer of third party defendant Hyrum Jensen to third party complaint.

Answer of third party defendant Harold D. Jensen to third party complaint.

Defendant's proposed instructions.

Verdict.

Judgment on verdict.

Notice of motion for judgment notwithstanding verdict, or in the alternative motion for a new trial.

Order denying motion for judgment notwithstanding verdict, or in the alternative motion for a new trial.

Notice of appeal.

Supersedeas bond.

Designation of contents of the record on appeal.

Plaintiff's exhibits 1 to 21 inclusive.

Defendant's exhibits A to Z inclusive, and AA to AY inclusive.

In Witness Whereof, I have hereunto set my hand and the seal of the said Court this 10th day of December, 1957.

[Seal]

C. W. CALBREATH,
Clerk,

/s/ By C. C. EVENSEN,
Deputy Clerk.

In the United States District Court, Northern
District of California, Northern Division

No. 7489

HYRUM JENSEN, doing business as EUREKA
LUMBER COMPANY, Plaintiff,

vs.

BOSTON INSURANCE COMPANY,
Defendant.

TRANSCRIPT OF PROCEEDINGS

Appearances: For the Plaintiff: Messrs. Hilger
& Thomas, by Frederick L. Hilger, Esq. For the
Defendant: Messrs. Cooley, Crowley, Gaither, God-
ward, Castro & Huddleson, by Augustus Castro,
Esq.

September 24, 1957 [1]*

(A Jury was duly impaneled to try the cause,
after which counsel for the respective parties
made opening statements to the Jury as fol-
lows:)

Opening Statement on Behalf of the Plaintiff

Mr. Hilger: If your Honor please, counsel, and
Ladies and Gentlemen of the Jury, it has been
explained to you that this is a case involving a
claim by Mr. Hyrum Jensen, the plaintiff, against
the Boston Insurance Company. We shall prove in

* Page numbers appearing at top of page of Reporter's Tran-
script of Record.

connection with our case, Ladies and Gentlemen, that in May or early June, 1956, a policy of insurance was issued covering the inventory of the Eureka Lumber Company, a sole proprietorship owned and operated by Mr. Jensen in Eureka, California. That insurance was replacement of preexisting insurance that had been covering that same property prior to the issuance of this particular policy.

Shortly after the issue of this particular policy, and on June 25, 1956, a fire occurred at the premises of the Eureka Lumber Company at Third & Commercial Streets, in Eureka. The fire broke out or was first observed and discovered approximately five minutes after 12 on that day, shortly after noon; that it was 20 minutes before the fire-fighting operators appeared on the scene; that through an unfortunate accident, wherein the fire department connected both ends of the hose to two separate fire plugs, it was another seven minutes or so before any water was applied to the fire. [2]

Our proof will show, Ladies and Gentlemen, the bulk of the stock of the Eureka Lumber Company that was affected by this fire was kiln-dried moldings loosely stacked in a building that was so constructed that a large lumber truck, such as you can observe upon the highway, could drive completely through the shed area.

Our proof will show that during that interval, while the building was burning, and particularly in the area where this dry molding was stored, that some 66,000 board feet of kiln-dried redwood moldings were entirely consumed in the flames, that ap-

proximately 35,000 board feet of redwood fence material was entirely consumed, that a portable sawmill, a small mill that had been held in stock by the Eureka Lumber Company was consumed in the flames, and the remaining portions, the diesel power unit, the wheels and pulleys were warped and so damaged by the heat and the temper taken out of the steel and that sort of thing that it is now valueless.

We will prove in connection, Ladies and Gentlemen, with the moldings, first of all, that it had before the start of the fire a reasonable market value of \$220 per thousand board feet, or a total value in excess of \$14,000. We will show that the fence material had a value prior to the fire of \$85 per thousand board feet. We will show, Ladies and Gentlemen, that under the terms of the policy of insurance any inventory on the premises of the insured which had been sold prior to the [3] occurrence of the fire "shall have as its value the sale price of the inventory that has been sold but not yet delivered, and which is damaged or consumed in the fire." That is, any inventory that has been sold but not yet delivered, and which is damaged or consumed in the fire, shall be valued at the sale price of that item.

Our proof will show, Ladies and Gentlemen, that this sawmill had been sold to Dayton Murray Truck Sales some months prior to the fire and was property awaiting delivery to them at the time of the fire.

Stored adjacent to the moldings and the lumber products that I have described we will show that

there was a warehouse containing other building material such as doors, door casings, builders hardware, roofing materials, paint, sheetrock, roofing tar, and that all of these items were damaged so as to render them worthless from the point of view of the plaintiff, who held them for sale in the ordinary course of his business. Our proof will show that there were remains of these latter items I have mentioned in the warehouse sufficient to permit the number and quantity of them to be counted by a certified public accountant and an inventory prepared and made up, which was later incorporated into a proof of loss and a demand for payment against the insurance carrier. We will show that that material had a value in and of itself of approximately \$6,000 to \$7,000. Those items of doors, paint, items where remnants remained [4] sufficient to permit counting, motors, hardware—we will show that all of these items of loss that I have mentioned were incorporated into a proof-of-loss form and submitted to the insurance carrier to support the claim for payment. The total value, we will show, of the loss, of the damage exceeded \$33,000. The policy limits are \$20,000.

Our proof will further show that we filed our proof of loss, or the plaintiff filed his proof of loss in August, 1956, and asked for the appointment of an appraiser, and no appraiser was appointed by the insurance carrier. Action was filed, which is why we are here today. Thank you, Ladies and Gentlemen.

The Court: Are you going to reserve your state-

ment, Mr. Castro, or do you want to make it now?

Mr. Castro: I would like to make the opening statement at this time, your Honor.

The Court: All right.

Mr. Castro: Counsel, I have a floor plan of the building. Would it be all right to use it in the opening statement as far as you are concerned?

Mr. Hilger: Certainly, counsel.

Mr. Castro: Your Honor, could the diagram now be marked as an exhibit for illustration purposes?

The Court: Very well.

(The chart referred to was thereupon marked Defendant's Exhibit A for identification.) [5]

Opening Statement On Behalf of the Defendant

Mr. Castro: May it please the Court, Ladies and Gentlemen of the Jury, and counsel, in defense of this case I believe the evidence will be produced by the defendants as well as from examination of the plaintiff and his witnesses in substantially the following manner:

The policy of insurance is a standard California fire insurance policy in the form prescribed by the insurance code of the State of California. It provides that in the event of fraud on the part of the insured relating to a loss, that the policy shall be void. That is the first basis of our defense in this case.

The other provisions which are involved are the provisions of the standard California fire insurance policy that requires the insured parties to submit to an examination under oath after a fire has occurred, and to produce other books and records,

such as invoices and bills and vouchers to support the loss which they are claiming. The third basis of the defense is that the fire was a set fire by Hyrum Jensen and Harold Jensen.

The evidence will show that the building that we are talking about is situated in the City of Eureka, California, and that it is approximately 92 feet in width and approximately 100 feet in depth, and it is situated at the corner of Third & Commercial Streets. The building is divided into two parts. The West half of the building, to which I am pointing, is a shed [6] area or a dirt floor area which is open at the north end and is open at the south end. The remainder of the building, the east portion of the building, is the office and warehouse section of the building with the office being the area in this corner and immediately to the north of that was some storage.

This room in the east section was used for garage purposes of an automobile. There was some storage in it. In this room there was some storage.

The evidence will show that the fire was recorded as being turned in by a box recordation in the City of Eureka, and the tape will be produced of that recordation, and it will show the fire alarm was recorded at 12:21 P.M. when the box alarm was turned in. The fire department was approximately four or five blocks from there, and it immediately went to the scene of the fire. Members of the fire department will be produced here and they will testify before you concerning those factors.

The evidence will show that the fire was discovered by third parties or outsiders when an explosion was heard, and immediately following the explosion there was observed coming out of the warehouse portion of the building black, heavy smoke. Within seconds after that explosion two men entered the building from Third Street and they went to the rear of the shed portions. At that time I expect them to testify that there was no fire in this shed area. The fire was observable in the [7] warehouse section to which I am now pointing. In the shed area, along the partition, between the two parts of the building, was a sawmill sitting on heavy planking, 12 x 12's or perhaps larger, and that sawmill blocked the entrance from Third Street, and that sawmill extended approximately between these two points to the north. These black points represent columns which I think are about 8 x 8 or 10 x 10 which supported the roof of the building.

The evidence will show that these two men then came back out of the building and went over to see whether the fire alarm had been called in. They then returned, and when they returned a second time the fire was beginning to eat through the partition wall between the two sections of the building.

The fire department arrived. When the fire department arrived the flames had come into the shed area, and that shed area is open from the dirt floor up to the roof, the roof being a corrugated metal or tin roof with joisting and members supporting it, and the fire had gone up into that area.

The fire department then put its line in through the west wall and put this fire back. This door, which is marked "Loading Door," was forced open and the fire department came through here and they observed the fire in the overhead area of this office room. They pulled down the plaster constituting the ceiling, and it was found that the fire was burning through at a point approximately here (indicating). Photographs will be [8] produced to show you that precise area.

The firemen then worked their way forward to the front of the office and into this small area marked "Door." This represents the front door of the building. They then worked their way in here and up the stairs area to the second floor, and the fire had gone from this room up into the joisting of the second floor and up to the ceiling and the roof of the second floor.

When the fire was exterminated, put out, the fire department went through the debris and they found four or five containers, which will be shown to you in photographs, situated in the area where the burning had occurred.

Counsel mentioned to you an area of 66,000 board feet of lumber. A one-gallon pail, completely open at the top, containing the remainder of diesel fluid, was found in the middle of lumber which was in this section. In this room a two-gallon container of gasoline was found with the top off. The Kaiser automobile, which was parked here, had its top taken off the gas inlet. In this room on the morning of the fire there had been placed a 50-gallon

drum of aviation gasoline, and the bung hole or top of that had been loosened.

Following that evidence pictures will be shown to you to prove that the source or origin of the fire was in this room that I have been talking about. This is a door which opens up into an alleyway (indicating). Those are railroad right-of-way [9] tracks at the rear. That door was locked from the inside at the time of the fire. When the fire department arrived you will see photographs of the fire at its inception taken by the local newspaper up there, which will show the door in its closed position. Likewise this door was in a locked position, and it will be shown in the same photographs. When the fire department arrived they forced this door or this door open—I have forgotten which it was—but they can tell you. This door along the east side was locked and was forced open by them. The only entrance to the warehouse section of the building from the front is this door to which I am pointing along Third Street, and that door was locked. When the people first tried to enter it that I told you about, the two men coming in here, they tried that door first and found it locked, and later on it was still locked when Hyrum Jensen returned to the scene of the fire.

The only other entry into this warehouse section is this point which I am pointing along the partition between the shed and the warehouse, and that door was also locked from the inside, and there will be shown you a picture of that door, how it was broken out, the hinges unhasped to take

it out of there to make an entry through there.

We will show you that the people in that building on that particular morning were Ellen Van Harpen, Mrs. Van Harpen being a lady who formerly had been in the lumber business with her husband, and she was acting as a bookkeeper and taking [10] care of the retail sales out of the office, and her task was in this approximate location. She left there shortly after 12:00 o'clock, got in her car, went over—I think she was driving her car—went over to a place called the Blue Ox, which was approximately a block away. She sat down, placed her order, and during the course of being served she heard the alarm sounded. At the time she left the only person left in the building was Harold Dee Jensen, and Mr. Jensen remained in the building alone after she left. Mr. Jensen is now deceased and the death certificate will be produced to substantiate that point.

Also after the explosion which I mentioned to you occurred in a matter of seconds Harold Jensen was seen leaving the area of this fire, and disinterested witnesses will be produced to establish the relationship at that time to the time of the explosion and what was seen.

Leaving the question of the causation of that fire and the connection of these parties with it, we will show concerning the inventory that first, under the terms of the policy, within a few weeks after the fire, we asked for the production of sellers' invoices. These people were engaged in a wholesale lumber business and a retail hardware busi-

ness, and we will show that in the normal course of business there are vendors' invoices or sellers' invoices to people, and if you have bought from them during the period of six months or a year before the fire you can normally go to your seller and he will furnish you [11] with a copy of that invoice. We had requested those records, first orally and then in writing, several times, and they have never been produced to support a claim of 66,000 board feet of kiln-dried lumber. In fact, we have invoices which will show that the lumber that he is talking about being kiln-dried during the period from August, 1955, up to the time of this fire, they had bought what we call green moldings, redwood molding, and we will show you that green redwood molding is not kiln-dried. We will show that it is not stored in the Eureka warehouse. It is kept on the outside.

Evidence will show that 66,000 board feet of molding is a sizable amount of lumber, representing approximately two carloads of lumber, and 35,000 board feet of fence board will represent approximately one carload of lumber. We are only dealing with an area in here of approximately 46 feet wide half way to the front end of the building, which would be approximately 50 feet. Counsel has already told you that this section of it, the west section of that shed, was kept in an open condition, and photographs will be produced to show you that there was a driveway through it, so storage would have to be limited to this small space that I have referred to.

Witnesses will be produced who will tell you that they were in there within a reasonable period of time before the fire, 48 hours before the fire, and that there was no redwood molding in that amount stacked in there. Redwood molding is [12] stacked in two ways. They put it on end or they put it in racks, because kiln-dried redwood molding is expensive, costing \$220 a thousand, and it is handled with so-called kid gloves, even in the lumber business.

Photographs will be shown of this area where they claim 66,000 board feet were contained, and you will see the type of lumber which is there, and it is not a lumber of the \$220 thousand class. In the area where they said they had the fence boards photographs will be shown you of that area. The burning was not heavy and you can see the pieces that were involved in that particular area.

Going one step further, evidence will be produced that the redwood which they had bought—first, the evidence will be produced to show that the Eureka Lumber Company, the man insured here, was engaged in the business primarily of buying reject lumber from mills and then they would re-sort the lumber and remanufacture it, and then they would grade it up, and that was the process which they were using with which to do their business. The evidence will show that the lumber which they were buying was being bought approximately, so far as redwood molding was concerned, at \$20 a thousand, and that this lumber had not been re-sorted or graded upward that they talked about.

The evidence will also go to show something concerning motive in this case, and that motive we believe will be a [13] financial motive. The evidence will show that Harold Dee Jensen was in financial troubles and went into bankruptcy in the fall of 1955. Following his adjudication as a bankrupt the moneys from the Eureka Lumber Company were then taken to be transferred from the Eureka Lumber Company account into his personal account. The evidence will show that beginning in January, 1956, attachments began to hit the account of Hyrum Jensen, and that those attachments hitting, more and more money appeared turning up in the bank account of Harold Dee Jensen. Up to the time of the fire there were three or four attachments, so that in June, three days before the fire, the bank account of the company was closed out and they had no bank account, and Harold Dee Jensen's bank account was reduced to about \$35.

The evidence will show that they had accounts payable in excess of, I believe, \$75,000. They had notes payable in substantially the same amount, that the creditors were pressing them, and that they made certain borrowings from the Crocker-Anglo Bank to meet these obligations, and the last loan was \$15,000 on June 18th, seven days before the fire, which was applied to an obligation for the purchase of a home by Jensen, and a creditor to whom he owed some \$18,000 was pressing him, and that was the obligation which was paid there. I believe that will be substantially the evidence which

we will offer in this case. Our part comes after the plaintiff's, and we will ask you to reserve your judgment until you have heard the [14] evidence which I think we will be able to produce.

The Court: Members of the Jury, we will take a brief recess at this time.

(Thereupon after the statutory admonition, a brief recess was taken.)

The Court: You may proceed, counsel.

Mr. Hilger: At this time, your Honor, the plaintiff would offer and read in evidence the deposition of Robert S. Goldblatt, taken in Eureka on the 7th day of September, 1957.

Mr. Castro: There is a series of depositions, your Honor, and there are objections which may be discussed. Shall we take them up in advance or as they come up?

The Court: What is this deposition about, counsel?

Mr. Hilger: This deposition, your Honor, is the deposition of Robert Goldblatt, the agent of the Boston Fire Insurance Company, which issued the policy, the agent who delivered it, who extended credit, and who had certain conversation with the plaintiff concerning additional insurance.

The Court: What is the materiality of that? Aren't you gentlemen going to shorten this trial by agreeing that the policy was issued, that it was in effect at the time, and so forth?

Mr. Castro: We have already admitted that, your Honor.

Mr. Hilger: There is an allegation in the cross-

complaint [15] of the issuance of the policy, your Honor, but as to the answer to our complaint there is no admission that it was issued and executed. We will accept the stipulation of counsel that it was issued, but there is matter in this deposition regarding an issue that has been raised by the defendant, a discussion between Mr. Goldblatt and Mr. Jensen shortly before the fire regarding additional insurance, which would tend to relate itself to the issue of incendiarism.

The Court: Is the policy in evidence?

Mr. Hilger: The policy is not in evidence.

The Court: Do you want to put it in? Will you need to?

Mr. Castro: We should, unless there is a dispute about the provisions, your Honor.

The Court: You say you should?

Mr. Castro: It probably should be placed in evidence.

The Court: Has anybody got a copy of the policy?

Mr. Hilger: There is a copy of the policy attached to the deposition of Mr. Goldblatt. If it is a legible copy we will offer that. The one that is attached to mine is not very legible when we get to the endorsements.

The Court: Is there any objection to detaching this from the deposition?

Mr. Castro: No, there is not, your Honor, by the defendant. [16]

Mr. Hilger: No objection.

The Court: Mark the policy of insurance Plaintiff's Exhibit 1.

(The policy referred to was thereupon received in evidence and marked Plaintiff's Exhibit 1.)

The Court: Are there some portions of this deposition you wish to read?

Mr. Hilger: Yes, your Honor, beginning on page 3, line 9, and going down to the conclusion of the direct examination on page 4. Is it your procedure that I take the stand and read it in question and answer form, or should I do it from here?

The Court: Any way that is convenient. You can do it right there if you wish. You might tell the Jury what this deposition is and who the party is.

Mr. Hilger: Robert S. Goldblatt is a resident of Eureka, California. He is an agent for the Boston Fire Insurance Company, among others, and it was he who sold and delivered the policy of insurance here involved to the Eureka Lumber Company. He worked with Walter Warren & Associates Insurance Agency. The Eureka Lumber Company was one of his class or accounts whose insurance he had cared for for some past period years prior to 1956. I propounded the questions that I shall read and Mr. Goldblatt has given the answers after being sworn in the same manner as a witness who would appear here. [17]

(Mr. Hilger read as follows:)

“ROBERT S. GOLDBLATT

a witness, being of lawful age, and being first duly sworn in the above cause, testified on his oath as follows:

“Q. Subsequent to the issuance of that policy on before the fire of June of 1956 did you discuss further insurance or did you discuss insurance with a representative of the Eureka Lumber Company?

“A. I did.

“Q. When did that discussion take place, as far as you recall?

“A. I can't recall the exact date. It was approximately the first of June.

“Q. Of 1956? A. Of 1956.

“Q. And do you recall with whom that discussion was?

“A. With Dee Jensen or Harold Jensen, however you might refer to him. I knew him only as Dee Jensen.

“Q. Now then insofar as it's related to insurance, what was the gist of that discussion?

“A. Well, I was primarily interested in [18] the fact he had done quite a bit of work on this building and I was concerned, he might be interested in increasing his present insurance.

“Q. Did you propose at that time to Mr. Jensen that he increase his insurance? A. I did.

“Q. So far as you know, did he increase his insurance thereafter? A. He did not.

“Q. What? A. He did not.

“Q. What led you to suggest additional insurance to Mr. Jensen?

(Deposition of Robert S. Goldblatt.)

Mr. Castro: There is an objection to that question, your Honor.

The Court: You make the objection now?

Mr. Castro: I withdraw the objection.

"A. Prior visits to the particular building in question I noticed the remodeling that had been undertaken since the policy had first been written. I figured the value had been increased and that it was part of—it was our job to make these suggestions and see if something could be worked out to bring his insurance more up to value.

"Q. In other words, your testimony would be [19] you felt he was underinsured in that location?"

Mr. Castro: There is an objection to that, your Honor, which we will stand on.

The Court: It is a conclusion of the witness. I think the objection is good, although the witness has already given the facts with respect to it in his previous answer. I will sustain the objection. Is that all you wish to read?

Mr. Hilger: That is all we wish to read from that deposition.

The Court: At this time do you wish to read any of the cross examination or would you prefer to wait for that?

Mr. Castro: May I read it at this time, your Honor?

The Court: All right.

Mr. Castro: This is the cross examination of

(Deposition of Robert S. Goldblatt.)

Mr. Goldblatt at his deposition on September 7th of this year.

“Q. Do you have your records with you?

“A. Yes, sir.

“Q. May I see them?

“A. The entire file?

“Q. If you please. A. Oh, sure.

“Q. Do you have a letter of transmittal on the subject policy? A. As respect what?

“Q. Have you to the Eureka Lumber Company?

“A. A letter of transmittal, I don't quite understand what you mean by that?

“Q. Did you deliver the policy in person to the Eureka Lumber Company or did you mail it?

“A. This particular policy was mailed. I believe there is a letter of transmittal in there, and it probably is attached. I can locate it for you, if it's not attached to there.

“Q. Would you do that?

“A. Yes, surely. Is the letter, isn't it contained in this file here?

“Q. It's the last one here.

“A. Yes. I'll check that and confirm it. Yes, that's the one.

“Q. The policy of Boston Insurance Company which is the subject of this litigation was delivered under date of June 5th, 1956, by mail to the Eureka Lumber Company? A. That's correct.

“Q. And is this a true and correct copy of the letter which transmitted it, the transmittal letter?

“A. That's correct.

(Deposition of Robert S. Goldblatt.)

"Q. May we remove it?

"A. Yes, you sure may." [21]

Mr. Castro: The letter was then marked as an exhibit for identification, and at this time, your Honor, we offer in evidence that particular letter.

The Court: I have the one that was attached to the deposition. Do you wish to put that in evidence?

Mr. Castro: Yes, please.

(The document referred to was thereupon received in evidence and marked Defendant's Exhibit B.)

Mr. Castro: May I read Exhibit B. This is the letter referred to as the transmittal letter bearing date June 5th, 1956, addressed to the Eureka Lumber Company:

"June 5, 1956.

"Eureka Lumber Co.
3rd and Commercial Sts.
Eureka, California

"Gentlemen:

"The enclosed policy is a replacement contract for the \$20,000 Stock policy which was cancelled recently by notice.

"We ordered a new contract in lieu of the other policy so that we could have a little more time to pay the premium due thereon.

"There will be an Earned Premium for the time the Fire Insurance was in effect and we shall remit a statement to you shortly on this short term charge.

(Deposition of Robert S. Goldblatt.)

"If there are any questions regarding the [22] enclosed, please do not hesitate to get in touch with us.

"Kindest regards,

"Walter J. Warren & Associates, Inc."

(The reading of the deposition was resumed as follows:)

"Q. Would you tell me on what date the Pennsylvania Fire Insurance Company policy was delivered?

"A. There was, excuse me, an initial policy delivered around the first of January in '54 and that policy was subsequently rewritten."

The Court: I do not see the materiality of this. I have been glancing at it. If there is anything special you want to read, find that.

Mr. Castro: Yes, your Honor. I think the easiest way to do it would be to put it on as part of our case.

The Court: You can reserve the right to put it in as part of your case.

Mr. Castro: Thank you, your Honor.

The Court: Call your next witness.

Mr. Hilger: At this time we would like to read into evidence the deposition of A. J. Franceschi taken in Eureka, California on September 7th, 1957.

The Court: All right, counsel. [23]

Mr. Hilger: The questioning was propounded by myself to A. J. Franceschi:

(Reading.)

(Deposition of A. J. Franceschi.)

The Court: It is not directly responsive, but in view of the opening statement of the defense counsel I think that I will allow it. I will deny the motion to strike. You are putting in some things that may be a little out of order, which may be more in the nature of rebuttal than part of your direct case.

Mr. Hilger: There are certain preliminary items that this deposition will prove, and I thought the more orderly way to do it would be to read it consecutively.

The Court: All right.

“A. That’s right. And they had also—we had loaned them money on various occasions on an unsecured basis which we were always taken [26] care of as agreed.

“Q. Now then, Mr. Franceschi, in connection with the bank account—do you have a signature card concerning the Eureka Lumber Company bank account that was in effect on June 25th, 1956?

“A. Yes.

“Q. Do you have it with you there?

“A. I do, yes.

“Q. May I see it?”

The Court: What is the materiality of all this as to the signature card?

Mr. Hilger: There is an allegation, your Honor, that Harold Dee Jensen had an interest in the business, the bank account and the inventory of the Eureka Lumber Company. We offer it to prove that the bank account was the sole property of

(Deposition of A. J. Franceschi.)

H. M. Jensen and had been since its opening with the Crocker Anglo Bank.

The Court: Are you standing on that count, Mr. Castro? Is that an issue in the case of any consequence?

Mr. Castro: Yes, there is, your Honor, concerning Harold Dee Jensen's interest.

The Court: I assume that has some relationship to the special defense.

Mr. Castro: Yes, your Honor.

The Court: All right, go ahead. [27]

"Now, Mr. Franceschi, that signature card that you have there, is that a part of the bank records?

"A. Yes, it is.

"Q. Is that regularly maintained in the course of the bank's business? "A. Yes, it is.

"Q. Is it prepared at the time the account is placed into effect or opened?

"A. When the account is opened, that's correct.

"Q. That signature card is in your custody as an official of the Crocker Anglo Bank?

"A. Yes, that's right.

"Q. Now then referring to this signature card which we'll ask at this time to be marked as Plaintiff's Exhibit next in order so that we may refer to it——"

At this time we would offer the signature card in evidence as Plaintiff's next exhibit.

The Court: Shall I detach it from the deposition?

(Deposition of A. J. Franceschi.)

Mr. Hilger: By detaching it from the deposition, yes, your Honor.

(The document referred to was thereupon received in evidence and marked Plaintiff's exhibit 2.)

"Mr. Hilger: Now referring to this Plaintiff's [28] Exhibit One, what person was authorized to sign checks on the account at the Eureka Lumber Company?

"A. H. M. Jensen is the only one.

"Q. There were no other authorized signatures?

"A. No sir, not to my knowledge.

"Q. Now, then, Mr. Franceschi, you have stated that in connection with your banking business you have had occasion to loan to Eureka Lumber Company money?

"A. That's right, on several occasions.

"Q. Having reference to the time prior to June 25th of 1956, what was the bank's experience in connection with the liquidation or repayment of those loans?

"A. Always taken care of as agreed.

"Q. Now on the date of June 25th, 1956, did the bank have any outstanding loans to the Eureka Lumber Company?

"A. Yes, we had two loans for a total of ten thousand dollars, neither one of which were due.

"Q. When were those loans negotiated?

"A. March the first of '56, five thousand and June the 18th of '56, five thousand.

"Q. June the 18th of '56 would be one week

(Deposition of A. J. Franceschi.)

prior to June 25th and you had loaned the Eureka [29] Lumber Company five thousand dollars?

“A. That’s right.

“Q. On June 25th, 1956, what was the credit standing of the Eureka Lumber Company with your bank?”

Mr. Castro: Objection to that, your Honor, on which we stand.

The Court: I will overrule the objection.

“A. As far as we were concerned, it was good.”

The Court: Do you want to take up your cross examination of this witness now, Mr. Castro, or do you want to reserve it?

Mr. Castro: Not at this time, your Honor. I will reserve it.

Mr. Hilger: At this time, your Honor, to complete the testimony of Mr. Franceschi, a subsequent deposition was taken at which further direct examination was made, which by stipulation could be considered a part of the deposition just read on behalf of the plaintiff. It might require, in view of the deferring of the cross examination, in which a Hess transaction was developed, to which reference is made in the latter portion of this deposition, it might require either the reading of the cross examination or a word of explanation that an additional transaction was developed under cross examination.

The Court: I am not familiar with what you are [30] speaking about. I am not attempting to limit counsel. Proceed in whatever way you want to present your evidence.

(Deposition of A. J. Franceschi.)

Mr. Hilger: It developed in the cross examination that Mr. Jensen had purchased the property upon which the building that burned was situated from a Mrs. Hess, and that there was a deferred balance payable monthly, and it further developed that the Crocker Bank had a record of those payments that had been made up to the time of the fire on that obligation to Mrs. Hess, and it is in connection with that transaction that I would like to continue Mr. Franceschi's testimony and offer in evidence the payment record that is attached to the deposition.

The Court: Attached to the first deposition?

Mr. Hilger: I believe it may have been attached to the second. I know the context appears in the second, although by stipulation it is part of the first.

The Court: There seems to be a bulky document attached here. You might take this. Is this what you have reference to? That is attached to the first deposition.

Mr. Hilger: Yes, that is the document to which I had reference.

The Court: You may offer it in connection with this testimony, whichever way you wish to proceed.

Mr. Hilger: Thank you, your Honor. Referring now to page 8, beginning at line 21 of the deposition of [31] A. J. Franceschi, taken on September 18, 1957, in Eureka.

“Mr. Hilger: At this time I would like to identify for the record and have attached as an exhibit

(Deposition of A. J. Franceschi.)

the analysis of payment on Jensen note receivable, it's entitled that way on the top, and Anna H. Hess," to which Mr. Castro stipulated.

"The Witness: That's note payable, it would be a note payable, wouldn't it?

"Mr. Hilger: It says analysis of payment on Jensen note receivable is the heading of the piece of paper.

"The Witness: Mrs. Hess, yes, I am sorry, it was to her, that's right.

"Mr. Hilger: Now then this copy of the document that I am handing you relates to what transaction?

"A. It's payment made by Hyrum Johnson on his note.

"Q. Hyrum Jensen?

"A. Hyrum Jensen on his note in favor of Anna Hess.

"Q. Is that the note covering the deferred balance on the purchase price of the land that you have previously testified concerning?

"A. Yes, on Third Street between Commercial [32] and Broadway.

"Q. As I understand it, your bank received the collection from Mr. Jensen on behalf of Mrs. Hess as a service to her?

"A. Actually, payments were made to Mrs. Hess and she in turn came over to the bank and we made an endorsement on the note.

"Q. I see.

"A. That's why she signed it, that's her signature.

(Deposition of A. J. Franceschi.)

“Q. That’s the signature of Anna Hess?

“A. Anna Hess.

“Q. Appearing on that copy? “A. Yes.

“Q. That’s a true and correct copy of the payments made by Mr. Jensen?

“A. To Mrs. Hess.

“Q. That relates to the payments received on or about the dates indicated between January of 1954 through June of 1956?

“A. That’s right.

“Q. I refer to the total or rather the final figure in the first column of figures under the heading——”

Mr. Castro: To which we object, that being a later [33] transaction connected with the Pennsylvania Insurance Company dated April, 1957.

The Court: I do not see anything about any insurance company here.

Mr. Castro: No, your Honor. Do you have that pay record there?

The Court: He is referring to an analysis of payments on the Jensen note to Mrs. Anna Hess.

Mr. Castro: The last payment which was made is what the series of questions is referring to.

The Court: It is not clear to me.

Mr. Hilger: It appears on the payment schedule, your Honor, either as a total or a payment, but in order to make sure there is no misunderstanding what that figure is which appears on that schedule, I ask to clarify it by these questions.

(Deposition of A. J. Franceschi.)

The Court: Is \$246.59 the total amount of the payments?

Mr. Hilger: That is what this line of questioning is designed to show, exactly what it is. It develops it is not.

Mr. Castro: That refers to a payment in the next year, does it not, your Honor?

The Court: It says 1956, and on June 19th it shows \$413.31. I do not understand what you are talking about. I may be a little obtuse this morning.

Mr. Hilger: Perhaps if I read the questions and [34] answers it would develop what that item covers.

The Court: Go ahead and read it.

Mr. Hilger: Was I at line 3 on page 10?

“Q. I refer to the total or rather the final figure in the first column of figures under the heading ‘amount of payment’, and the figure being ten thousand two hundred and forty-six dollars and fifty-nine cents. What does that figure represent?

“A. That’s the total payment made at that time.

“Q. The total of payments made during an interval—

“A. (Int’g) No, that was the total payment made on that particular date of which five thousand four hundred and seventy-three thirty-four was credited to interest and the balance of four thousand seven seventy-three twenty-five was applied on principal and, as I recall, I think that was the settlement of the fire loss.

(Deposition of A. J. Franceschi.)

“Q. That’s on the building? “A. Right.

“Q. The figures above that would represent the monthly payments made by Mr. Jensen up to June, 1956?

“A. That’s correct, it was an odd note, had called for payment of two hundred and fifty dollars [35] for so many months and then five hundred dollars for the balance.

“Q. Is that how it was? “A. Yes.”

At this time we will offer that payment schedule in evidence as Plaintiff’s next in order.

The Court: I will detach it.

(The document referred to was thereupon received in evidence and marked Plaintiff’s Exhibit 3.)

The Court: I understand now what you are trying to get at. The last total item is not total payments but was a distribution of the amount which the witness said was received from the fire loss on the building.

Mr. Hilger: That is correct; additional payments, not a total. At this time we will call Mr. Hyrum Jensen.

HYRUM JENSEN

the Plaintiff herein, was called as a witness on his own behalf, and being first duly sworn testified as follows:

Direct Examination

Q. (By Mr. Hilger): Will you please state your name to the Court and Jury?

(Testimony of Hyrum Jensen.)

A. I am just a little bit hard of hearing.

Q. Will you please state your name to the Court and Jury? A. My name is Hyrum Jensen.

Mr. Hilger: At this time we offer into evidence, [36] your Honor, the exemplified copy of the certificate of doing business under a fictitious name, and the affidavit of publication thereof, duly exemplified by the County Clerk and the Superior Court Judge of the County of Humboldt.

Mr. Castro: I object on the ground it is incompetent, irrelevant and immaterial since it is dated October 31, 1956.

The Court: What was the date of the fire?

Mr. Castro: June 25th, 1956.

Mr. Hilger: The date of the filing of the action was December 5th, 1956, after the effective date.

The Court: I think the objection goes to the weight of this document, not to its admissibility. Admitted.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit 4.)

Q. (By Mr. Hilger): Where do you reside, Mr. Jensen?

A. 2434 E Street, Eureka, California.

Q. How long have you resided in Eureka?

A. About 12 years.

Q. What is your business or occupation?

A. I beg your pardon. I didn't hear that.

Q. I am sorry.

The Court: Get up closer.

(Testimony of Hyrum Jensen.)

Q. (By Mr. Hilger): What is your business or occupation?

A. I own the Eureka Lumber Company, retail and wholesale lumber. [37]

Q. How long have you been engaged in that business?

A. I think it was in early 1954; the latter part of 1953 or 1954, I forget just which it was.

Q. You acquired it?

A. I bought it, yes.

Q. Prior to that time what business had you been in?

A. I owned a little sawmill that I had leased to my son Harold Dee Jensen.

Q. Your son Harold Dee Jensen died July 12th last past? A. Yes.

Q. Who owned the Eureka Lumber Company, Mr. Jensen? A. I do.

Q. Referring to the period of its acquisition in late 1953 to the present time has anyone other than yourself owned any interest of any sort or character in the Eureka Lumber Company?

A. No, no one.

Q. What was the nature of your business in June, 1956, and prior thereto?

A. Well, we were retailing and wholesaling lumber. We were remanufacturing in the yard and also in the main building. We had a bunch of dry molding, door casing, baseboards and so on, that we had inquiries for some 1x1's clear, kiln-dried, so we

(Testimony of Hyrum Jensen.)

were checking the amount of lumber that we had and we were going to cut it into 1x1's.

Q. That was the ordinary course of your business to—— [38]

A. Yes, it was remanufacturing.

Q. And selling? A. And selling.

Q. Where was that business conducted on June 25th, 1956, and prior thereto?

A. That was Third & Commercial, between Commercial and Broadway.

Q. In Eureka? A. In Eureka.

Q. There is on the board a plat or an outline—a floor plan it would be better described—the building. Will you look that over, Mr. Jensen, and see if that is a fairly accurate exposition—step up there and look it over, if you will, the locations, footages, and see if that is an accurate floor plan of your building before the fire?

A. Yes, I think that is fairly close. This back here——

Q. You are referring now to what area?

A. I had better wait until you ask me a question, I guess.

Q. Where was that building situated on the lot that it occupied?

A. It was on the east side and south. It covered practically a block, that is, up to the alley.

Q. The east side would be Commercial Street?

A. Yes, it would.

Q. Just across the sidewalk area? [39]

A. Yes, on this side would be Commercial.

(Testimony of Hyrum Jensen.)

Q. On the south side would be Third Street?

A. That is right. This is Third Street here.

Q. Behind it, to the north side, what was located there?

A. There was a railroad spur that ran up along here, and the Mercer Frazer Cement Works and Ready Mix was right next to it.

Q. On the other side of the railroad track?

A. Yes, on the other side of the railroad track. There was a small alleyway here, I imagine, 20 feet from the building.

Q. What was to the west of the building?

A. In here——

Q. No, I mean outside the building, Mr. Jensen. What was adjacent to the building on the west side?

A. That was lumber coming in and going to be remanufactured, up-graded and graded.

Q. That was your lumber? A. Yes, it was.

Q. Was that a vacant or, rather, unimproved lot with no buildings on it?

A. No buildings on it.

Q. How large was that area to the west that had no buildings on it?

A. I imagine it was about a hundred and forty-eight feet, I believe, to the street and then Broadway divided, and we also [40] had another yard across the street from that on the railroad property.

Q. The complete block, then, between Commercial and Broadway was occupied by these premises, the building and the unimproved area?

(Testimony of Hyrum Jensen.)

A. Yes.

Q. And in addition you had a yard on the west side of Broadway? A. Yes, we did.

Q. Speaking now of the area outside the building, Mr. Jensen, what was stored there in June of 1956? A. Outside the building?

Q. Yes, on the open area.

A. There was lumber, all types of lumber. There was mostly 2x4's and 1x6's, and there was quite a bunch of kiln-dried redwood.

Q. Did you likewise have lumber stored over on the west side of Broadway?

A. Yes, we did, and we also had lumber stored across Third Street in a vacant lot there.

Q. Was any of the lumber stored outside the building, any of this lumber that you have referred to that was outside the building——

A. All of it was outside.

Q. All of this outside the building—— [41]

A. Yes.

Q. Was any of that damaged or affected by the fire of June 25th, 1956?

A. No, it was not. The fire stayed inside the building pretty well.

The Court: Why don't you have him sit down?

Mr. Hilger: Yes.

Q. Did you in the course of your business, Mr. Jensen, handle any merchandise other than lumber or molding? A. Yes, we did.

Q. What products in general did you carry in

(Testimony of Hyrum Jensen.)

the ordinary course of your business other than lumber?

A. A complete line of builders' supplies, sheet-rock, doors, windows, molding, baseboards, paint, turpentine, roofing material, shingles—a complete line of builders' supplies—hardware, nails.

Q. On June 25th, 1956, did you maintain an inventory of such merchandise?

A. Well, that was part of my son Harold Dee Jensen.

Q. What I mean to say is did you physically possess an inventory? I am not talking about accounts now.

A. Yes, we did. We had a large inventory.

Q. Let us consider some of that inventory. How often were you around these premises prior to the fire and up to the time of the fire, Mr. Jensen? [42]

A. I stayed in the open yard mostly. I took care of the remanufacturing and transferring of lumber, loading in and so on on the outside.

Q. That would be the wholesale sales?

A. That would be wholesale mostly and some retail.

Q. Did you go into the warehouse or the building portion upon occasion?

A. Yes, I did, quite often.

Q. How often would you go in just prior to the fire?
A. Well, four or five times a day.

Q. In connection with your conduct of the business and your visit there to the premises several

(Testimony of Hyrum Jensen.)

times daily did you have any familiarity or knowledge about the inventory on June 25th, 1956?

A. Yes, I did.

Q. Did you have any knowledge of where the various items making up that inventory were stored in the building?

A. We had a large amount of molding——

The Court: First he wants to know whether you know, and then he will ask you another question.

A. I beg your pardon. Yes, we did.

Q. (By Mr. Hilger): Referring specifically to an item of molding that appears——

The Court: Before you go into the details, perhaps we might take the luncheon recess at this time. [43] Members of the Jury, we will resume the trial at 2:00 o'clock. Will you please come back at that time. [44]

Afternoon Session, 2:00 O'Clock P.M.

HYRUM JENSEN

the Plaintiff herein, having been previously duly sworn, resumed the witness stand and testified further as follows:

Q. (By Mr. Hilger): Mr. Jensen, at the close of the morning session you had completed your testimony to the effect that you had observed the inventory at and shortly before the fire, the inventory both inside and outside the building. Did your firm carry in inventory in June, 1956, any redwood

(Testimony of Hyrum Jensen.)

moldings and casing items? A. Yes, we did.

Q. Will you explain to us what molding and casing inventory would consist of? Describe it.

A. Well, the molding would run about, after it was reconditioned and resawed, about \$280 a thousand.

Q. I hadn't reference to the price at this time, Mr. Jensen. Do you have trouble hearing me?

A. Yes, I do. That is better. I am sorry.

Q. Would you describe what a piece of molding or window casing is?

A. Oh, yes. It is a piece of clear lumber. It runs from two inches wide up until eight, and it is kiln-dried, and it is made into different patterns for door casings, baseboards, quarter round, and so on. I think everybody is familiar with quarter rounds, baseboards, window sills, and so on. [45]

Q. How is an item like that stored when it is kept in inventory?

A. Well, half inch is counted inch in width. It measures in board feet. Everything that is a half inch and up—in fact, a quarter of an inch—measures a square inch in board feet, and the biggest part of molding runs a half inch to a little more, that is, baseboards, window sills, and so on, after it has been surfaced and put into a pattern.

The Court: The lawyer was asking you how do you pile it.

The Witness: I beg your pardon. We pile it in units and strap it tight, or put sticks between in order to keep the moisture out of it. We call them strippers.

(Testimony of Hyrum Jensen.)

Q. (By Mr. Hilger): How high were these piles in your particular instance just prior to the fire?

A. Well, some of them was——

Mr. Castro: May we find out which piles we are talking about, your Honor, whether it was inside or outside the building?

Mr. Hilger: All my questions hereafter will be directed to inventory inside the building that was affected by the fire. Perhaps first of all we had better find out just where this molding material was stored in the building.

Q. Would you step there to the diagram and point to where that was stored? [46]

A. Yes. We had a portable sawmill about right in here, I would say, and the molding was stored all the way from here back to here and on back here, and in here there was another tier. These moldings would run from four to eight feet in length.

The Court: I don't think the witness understands your question. You said you were referring to what was inside the building, didn't you?

Mr. Hilger: That is correct, and this is the place within the building, your Honor, that it was stored.

The Court: Very well.

A. We had a row all the way from the front back here between the sawmill sitting here and the partition in this building. It ran all the way back here. Then we had another row piled up in here. And here were some posts in the center here to

(Testimony of Hyrum Jensen.)

hold the roof. We had this end piled full here, back of the door, and between here and there we had some piled up, and then there was a large pile right in here, and then down through here. We had this piled up pretty well about into there, and then we had at least a small place in here for a truck, and we cleared some out from this space in here and put back on the top of this, which was laying all loose, the ends sticking up and down in every direction. It was all dried and small, anywhere from 1x1's to 1x6's. And this was all kiln-dried molding. And back up in this extreme corner here we had fence material instead of molding. I beg your pardon on that. 1x6's and 1x8's, up [47] in this part here and down to here. The molding up in this part, in this part, and down through here (indicating on diagram).

Q. With reference to the southwest corner there where you indicate you cleared for a truck, had there been molding there prior to the time that truck moved in? A. Yes, sir.

Q. What had been done with the molding when that truck moved in?

A. We piled it on top of these piles back of this portable sawmill we had in here and over in this direction here. They were quite high when they were piled. They were not piled very neat, so it looked like it was more than it was, because it was piled loose.

Q. It was not tightly bound?

A. Not what we had taken out of this space here

(Testimony of Hyrum Jensen.)

and laying loose, but the other was mostly tightly bound.

Q. Did you perform any manufacturing function on that molding in connection with its manufacture?

A. Yes, we did. We would buy a cheaper grade of lumber, which was somewhat mismanufactured when we got it, and we would run it through our machines and cut off the bad places, a tear on the side or something where it wasn't cut perfect—we would run it through our machines and trim it all up like it should be. That was the kind of business we operated, so we could raise our price on good merchandise. [48]

Q. You would take mismanufactured material and make it into a properly manufactured product, was that it?

A. Yes, it was. We had quite a stock of this dried molding on hand and had it for quite awhile, and we had a couple of inquiries about—

Q. I will get into your quantity of it. But I just wanted you to describe the material, Mr. Jensen, where it was stored and the manner it was stored. The description you have given of the location of this molding and the manner in which it was stacked, was that a description of its condition just prior to the fire?

A. Yes, it was. About two weeks or ten days prior to the fire we had an inquiry from two different fellows, what we could furnish 1x1's for.

Q. At that time did you make any estimate or

(Testimony of Hyrum Jensen.)

did anyone in your organization make an estimate of the quantity of inventory that you had on hand?

A. Yes, we did. My son Dee called me over. He was the one who had the order, the inquiries.

Q. Do you recall who that inquiry was from?

A. Yes, I think one was from Mr. Wallace in Eureka, and the other I think was from a Russ Sharp through Baugh Lumber Company, molding company.

Q. Where would that be located?

A. That was in Los Angeles. [49]

Q. What did that inquiry call for? A. 1x1.

Mr. Castro: Objected to, your Honor, on the ground nobody else was there at that time. There was nobody there at that time, your Honor.

The Court: Are you making some objection?

Mr. Castro: Yes, your Honor. I think that—I won't do it. Thank you, your Honor. May I get the name of that other party he said he was talking to?

Mr. Hilger: Russ Sharp I believe is one of them.

The Witness: Wallace was a lumber broker.

Q. (By Mr. Hilger): What quantity of material did this inquiry call for to be delivered, Mr. Jensen?

A. I believe that one was for three carloads and I think the other was——

Mr. Castro: I will object to this as hearsay.

The Witness: Around about five carloads.

The Court: Just a moment.

The Witness: I beg your pardon.

(Testimony of Hyrum Jensen.)

Mr. Castro: I object to this as hearsay, your Honor.

The Court: Is the witness referring to something that was told him by his son?

Mr. Castro: I believe the witness is outlining a procedure he went through and the reason for it in estimating the quantity of molding. [50]

The Court: Of course, it would not be proper evidence of the fact of the inquiry, but I take it what you are using this for is merely a preliminary to show some action on the part of the plaintiff with respect to ascertaining quantity?

Mr. Hilger: That is correct.

The Court: If that is the purpose of it, I will overrule the objection.

Q. (By Mr. Hilger): Would you state for us, if you recall, the quantity that was called for to be delivered in these inquiries that you were investigating?

A. I think one was around three carloads and the other was about five. We thought we had better go out and check this stock to see if we could make these one of the——

The Court: Can't you move this along a little bit? Ask him what he did in connection with it.

Q. (By Mr. Hilger): In connection with that investigation what did you do toward ascertaining the existence or non-existence of that quantity of merchandise, Mr. Jensen?

A. We went over and estimated how much we could get out of it.

(Testimony of Hyrum Jensen.)

Q. You mean you looked at it?

A. Yes, we did.

Q. How long have you been in the lumber business, Mr. Jensen?

A. Ever since I was about 16 years old, off and on.

Q. In connection with your experience in the lumber business [51] have you been called upon to estimate the quantity of lumber in a given volume? A. Yes, I have, many times.

Q. Have you been called upon to classify and grade lumber by viewing and inspecting it in accordance with the standard grades?

A. Yes, I have. May I relate an incident—

The Court: No, you just answer the lawyer's questions. If you talk too much yourself, you will get yourself into trouble. Just answer his questions.

Q. (By Mr. Hilger): Mr. Jensen, after you looked at this lumber, gauged it and estimated it, did you form an opinion as to how much was there?

A. Yes, we did.

Q. Did you? A. I did.

Q. In your opinion how much was there?

A. Well, we figured at that time there was around 65,000 of the dry and about 35,000 of the green lumber in the finished material.

Q. How long prior to the fire was that, Mr. Jensen?

A. A week or ten days, I should say.

Q. After that estimate had been made, was there

(Testimony of Hyrum Jensen.)

any material change in size, description or character of that inventory before the fire? [52]

A. I believe that we put some more stock in there, if I remember right, from out of the yard that was dry. We put it in there in order to keep it out of the wet, if it would rain.

Q. Was that a material amount or a small amount?

A. Well, it was a rather small amount, maybe two or three thousand feet. We put it right in the doorway.

Q. Had there been any material amounts of that inventory removed after you made that estimate? A. Very little, if any.

Q. You have been in the lumber business for 13 years in connection with that background and experience. Do you know the value of lumber and lumber products in the Humboldt and Eureka area in 1956? A. I did, yes.

Q. Based upon that experience and your knowledge of your business have you an opinion as to the value of kiln-dried molding products in June of 1956? A. Yes.

Q. What is your opinion of the value of such products in good condition?

A. After we had remanufactured and put them in shape it ran all the way from 200 to 240, 280 a thousand.

Q. Do you have an opinion as to an average market value for the entire lot across the board?

A. Yes, that would have been very cheap. [53]

(Testimony of Hyrum Jensen.)

Most molding and stuff like that sold by the lineal foot.

Q. Would that be a greater value?

A. It would be greater. Sometimes it runs from four up as high as 12c a lineal foot.

Q. In terms of board feet you stated the value would run from \$200 to \$280 a thousand board feet?

A. Yes.

Q. Depending, I presume, on which type of product?

A. That is right.

Q. Having in mind the makeup of your inventory of molding products at the time of the fire, have you an opinion as to the average per thousand foot value of that molding stock in June, 1956, at the start of the fire?

A. I would say \$280 a thousand.

Q. \$280 a thousand?

A. Yes.

Q. Have you likewise in knowledge regarding the value of this fencing material in June, 1956, in Humboldt County?

A. Yes, I have.

Q. What in your opinion is the value of the fencing material at the start of the fire in June of 1956?

A. It would run about \$80 a thousand. These prices were wholesale prices.

Q. That would be the price that a wholesaler would pay, is that correct? [54]

A. Yes.

Q. What happened to the molding material in the fire? Was it affected by the fire at all?

A. Yes, it was all destroyed.

Q. Was there any material portion of it left?

(Testimony of Hyrum Jensen.)

A. There was a small pile of fence material left in the north side of the building.

Q. Will you point that out for us?

A. That would be right up in here (indicating). It hadn't burned. It was a little bit wet. I think they got the hose on it pretty much right at the opening there. It hadn't burned, although it was ruined, but there were still piles where you could see it was lying, but the dried molding and all of that was 99% burned.

Q. Was there any possibility of recovering anything of value out of the ashes?

A. No, there was not.

Mr. Hilger: At this time, your Honor, in order to speed things along, there is attached to the deposition of H. B. Whittet a photostatic copy of a proof of loss filed in this matter, and I'm wondering at this time if we can have that.

The Court: Which deposition is that?

Mr. Hilger: I believe it is H. B. Whittet.

The Court: Do you want to remove that?

Mr. Hilger: If you will, your Honor, and we will [55] offer it as our next exhibit in order.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit 5.)

Q. (By Mr. Hilger): After this fire occurred, and in connection with your negotiations with the insurance company, you caused to be prepared a listing of the items lost or damaged in the fire, did you not, Mr. Jensen? A. Yes, I did.

(Testimony of Hyrum Jensen.)

Q. On this Exhibit Number 5 that has just been introduced, a proof of loss, that is a true photostatic copy of the list which you caused to be prepared and submitted to the insurance company over your signature? A. That is right.

Q. The item that we have been discussing here, the redwood molding and window casings, appears as the first item in Exhibit B there, does it not?

A. Yes, it does.

Q. And the fence boards that we have mentioned is the second item on Exhibit B? A. Yes.

Q. Preceding Exhibit B there was an Exhibit A, consisting of five pages of listed materials and values set opposite them. I would like to inquire as to a few of the items on there, Mr. Jensen. A Porter cable electric chain saw. Do you know anything about that item? [56] A. Yes, I do.

Q. Was that a part of your inventory at the time of the fire?

A. Yes, that was part of our inventory.

Q. Do you know the value of that piece of inventory at the start of the fire?

A. The electric chain saw?

Q. Yes.

A. I think it was about \$125, the wholesale price, something like that. We had a gas power saw that was worth more than that. I don't know whether they listed that in as stock or not, or some of our equipment.

Q. That is not listed, Mr. Jensen. A. No.

Q. There also appears on page 5 of the exhibit

(Testimony of Hyrum Jensen.)

there a set of planer heads and planer knives. What would that consist of?

A. That goes on a high-speed planer. They sit on each side of the board, and they run about \$6 or \$700 a set, and we had ordered these for a customer of ours.

Q. Do you know the value of this set of knives and planer heads at the start of the fire in 1956?

A. I think they were around \$600. I am not sure of that but around that.

Q. I note you placed \$590 in your proof of loss.

A. That is pretty close. [57]

Q. Also appearing on page 5 of the proof of loss is 25 horsepower electric motor and a 50 horsepower electric motor. Are you familiar with those two items? A. Yes, I am.

Q. What was their condition at the start of the fire or just prior to the fire, Mr. Jensen?

A. They were in running condition. They was off a planer, and we had no use for them on this planer. We was going to operate it with a diesel motor, so we put them in for sale.

Q. They were part of your inventory at the time of the fire? A. Yes, they were.

Q. They were in running condition?

A. Yes, they were, very good.

Q. Have you seen them after the fire?

A. Yes.

Q. What was their condition immediately after the fire?

A. They were completely burned, ruined. I

(Testimony of Hyrum Jensen.)

called in an electrician and asked him if they were any good, and he said they were no good.

Mr. Castro: I object to this as hearsay, your Honor.

The Court: That part about his calling in an electrician and what the electrician said may go out as hearsay.

Q. (By Mr. Hilger): You did personally, [58] however, observe these motors yourself?

A. That is right. They were melted.

Q. There also appears on page 5 of the proof of loss a Miller electric welder with leads. Are you familiar with that piece of equipment?

A. Yes, sir, I am.

Q. Do you know from whom you obtained that?

A. From McGaraghan Supply House.

Q. Do you know what its cost was?

A. I think around \$800, maybe a little bit less. We bought it at a wholesale figure.

Mr. Hilger: Does the Court have attached to the deposition of Mark Evans an invoice?

The Court: Yes.

Mr. Hilger: May I detach that, please, your Honor? You have seen this, Mr. Castro?

Mr. Castro: Yes.

Q. (By Mr. Hilger): I show you an invoice from the McGaraghan Supply Company covering a Miller welder and showing a total cost of \$759.82. Would you refer to that and tell me whether or not the transaction reflected on that document cov-

(Testimony of Hyrum Jensen.)

ers the same welder that is shown here in your proof of loss? A. Yes, it is.

Q. Does that refresh your recollection as to the cost of it, Mr. Jensen? [59] A. Yes, it does.

Q. Is that \$759.82 the proper cost?

A. I would say that is right.

Mr. Hilger: We will offer this as Plaintiff's next exhibit.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit 6.)

Q. (By Mr. Hilger): What condition was that welder in at the start of the fire, Mr. Jensen?

A. It was new. It had just been purchased.

Q. It had just been uncrated? What was its condition after the fire? A. It was molded.

Q. Did it have any value at all?

A. If it was water, it would have run all over the floor.

Q. On page 5 of your proof of loss is a Babs hardware portable sawmill with a Cummings diesel engine. Are you familiar with that item?

A. Yes, I am.

Q. Where was that located at the time of the fire?

A. That was located right about here, over like that. We had just built it.

Q. Of what did that sawmill consist?

A. It had a 275 Cummings diesel.

Q. When you say "275 Cummings diesel," do you refer to the horsepower rating? [60]

(Testimony of Hyrum Jensen.)

A. Yes, 275 horsepower rating.

Q. That was the power unit? A. Yes.

Q. What else was on it?

A. Well, it was a complete portable sawmill with saws, belt, carriage, feed works.

Q. By carriage what do you mean?

A. That would run the log up and down to be sawed by the saw.

Q. What else was on it?

A. Well, there was a feed works.

Q. What is a feed works?

A. Feed works is a device that you push forward to make the log go through the saw, and when you are through cutting that board off, it pulls your saw back. There is a ratchet you pull over another inch or two inches to catch your next board, and you run that through with the feed works.

Q. It is the motive power behind the carriage?

A. Yes.

Q. Had that sawmill been sold at the time of the fire? A. Yes, it had.

Q. Do you know to whom?

A. We sold it to Dayton Murray. They are the G.M.C. dealer there. [61]

Q. Would that be the Dayton Motor Truck Sales? A. Yes, it was.

Q. Do you recall approximately when it was sold?

A. Not exactly. It was sold several months before the fire.

(Testimony of Hyrum Jensen.)

Q. Had Dayton Motor Truck Sales taken delivery of that item at the time of the fire?

A. No, they had not. It was still in the building.

Q. What was the sale price of that unit?

A. \$7500.

Q. Did you collect it all or any part of that sale price at the time of the fire?

A. We bought a truck and we turned in \$4,000 on the sawmill credit on the truck, and they owed us \$3500 balance.

Q. Was Dayton Murray Truck Sales under any obligation to retire that \$3500?

A. Yes, they were.

Q. And that was in addition to the \$4,000 that you had been allowed when you acquired the truck?

Q. Yes.

Q. What kind of truck was that you acquired?

A. G.M.C.

Q. Do you recall approximately the total price of it?

A. I think it was around \$19,000. I am not sure about that.

Q. Did you receive an invoice from Dayton Murray Truck Sales covering your purchase of the truck and your sale of the sawmill to them? [62]

A. Yes, I did.

Q. Do you know where the original of that invoice is now?

A. Why, it must have been burned in the fire.

Q. You don't know where it is?

A. Not personally I don't. My son Dee kept

(Testimony of Hyrum Jensen.)

care of all the records of all the stuff. That was under his office.

Q. You have not, at any rate, seen the invoice, or have you, since the fire, the original invoice covering that truck? A. I don't think so, no.

Q. Without going into detail covering the other items on the first five pages of the exhibit there that are listed and priced, would you look this over and indicate to us whether or not that is a correct and reasonably accurate statement of the type of inventory that you had stored in this building at the time of the fire? A. It is.

Q. Going into the storage of molding and fence board in the western approximately one-half of the building, would you step up to the board now, and perhaps you could use the pointer to assist you, Mr. Jensen, and let us begin with the northwest room that is shown there in the enclosed area to the east of the middle partition. Tell us in general what was stored in that location?

A. We sometimes had—— [63]

The Court: He wants to know at the time of the fire what was stored there.

Q. (By Mr. Hilger): Just prior to the fire, Mr. Jensen.

A. Okay. Well, we had furniture, we had a car-load of sheetrock, we had roofing, shingles, and we had a Kaiser automobile up in here. There were two open doors right there where we sometimes run it in, because we had an acetylene welder and dif-

(Testimony of Hyrum Jensen.)

ferent equipment was in this. Just used it to run around the yard with.

Q. Looking at the northeast room——

A. This one (indicating).

Q. That room right there—what in general was stored in there at and just prior to the time of the fire?

A. We had this filled with doors, hardwood doors, maple, ash, mahogany, bathtubs, bath fixtures, toilet bowls, windows, mirrors, wash basins, sinks, kitchen cabinets and like that.

Q. Referring to the southwest room, just to the east of the middle partition there, what was the character of the merchandise stored in that location, if any?

A. We had plywood, shingles, asbestos shingles, moldings—not moldings—I beg your pardon. I forgot something. Could I go back to that?

Q. The northeast room? Surely.

A. Yes, we had a whole bunch of pine molding boards and quarter round that we had ordered specially with the order we [64] had taken for these doors from a Mrs. Woods in Fortuna. Fourteen houses were ordered, and they were all stacked up in there at the time of the fire.

Q. And Mrs. Woods was a subdivider?

A. Yes, she was a contractor. This molding was in there, and this room was filled with shingles, asbestos siding—I don't know how much of that—not very much, asphalt roofing and shingles. Asphalt shingles, and there was a bunch of new truck

(Testimony of Hyrum Jensen.)

tires in this part here and an acetylene welding outfit, an electric welding outfit, and probably 50 or 70 truck filters for oil of a big type, and there was a lot of different storage in this front end that we had stored—welders' tools, electric air pump.

Q. You mean non-inventory type items?

A. These down here was non-inventory type.

Q. Move over, if you will, to the southeast room and describe just how that was laid out. Start at the south end. What was in that area where your pointer now is?

A. Right here we had a door entrance. It went up about four steps to our office, which is right about in here. That was our bookkeeper's office, and for a short time our son Dee had his office over in here. Here was where we had a closet, a clothes closet, and back of here was our store, in which we had a complete line of doors, linoleum and all types of floor covering. [65]

Q. Was that more or less your display room?

A. That was our display room. We had doors, windows, different types, and all such—a complete line of building supplies was in there.

Q. You went upon these premises after the fire, did you not? A. Yes, I did.

Q. Preliminarily, however, before we get into that, I will go back for a moment to the inventory and merchandise you described in those four rooms. In general are you familiar with its merchantability and condition just prior to and at the start of the fire?

(Testimony of Hyrum Jensen.)

A. Yes, it was all salable merchandise.

Q. Regularly stocked merchandise?

A. Yes, it was.

Q. In condition to be marketed in the ordinary course of your business? A. Yes.

Q. Did you go on the premises after the fire?

A. Yes, I did.

Q. Did you notice the condition of the inventory of those four rooms after the fire? A. I did.

Q. Will you describe it to us?

A. They were destroyed with the fire except the doors—may I step over here? [66]

Q. Surely.

A. This back part here, it hadn't burned. Just completely water soaked from top to bottom. Of course, practically all the windows and stuff like that were broken. Very few of them had not broken, and all the bathtubs, sinks, and stuff like that had been hot, and when they poured water on them, they had chipped. But the fire didn't get in there, only water, in this part here (indicating).

Q. Was there any smoke damage in that area?

A. Yes, it was all damaged very heavily with smoke and water.

Q. What effect did the water have on the doors, Mr. Jensen?

A. Well, it naturally warped them and soaked them all up.

Q. What type of doors were those?

A. They were outside doors, partition doors, big doors and smaller doors.

(Testimony of Hyrum Jensen.)

Q. From the point of view of their construction were they the type of doors that are referred to as hollow-core doors?

A. Some of them were, yes.

Q. That is the type where the two outside surfaces are pasted onto a frame?

A. Yes, sort of plywood.

Q. What had happened to those doors in connection with the water?

A. Just as soon as the water hit them the glue [67] give way and they just started to peel up on their ends, and they all turned black.

Q. Did you cause pictures to be made of this building and its interior after the fire?

A. Yes, I did.

Q. I am going to hand you this picture and ask you if that accurately and fairly depicts the appearance of that portion of the building after the fire?

A. Yes, it does.

Q. That is which part of the building, Mr. Jensen?

A. That is the front facing Third Street on the south.

Q. The portion down here shown on the south side?

A. That would be here (indicating on diagram).

Mr. Hilger: I will offer this as Plaintiff's next in order.

(The picture referred to was thereupon received in evidence and marked Plaintiff's Exhibit 7.)

(Testimony of Hyrum Jensen.)

Mr. Hilger: May the Jury see these at this time, your Honor?

The Court: If you wish. Are they all the same or are these different pictures?

Mr. Hilger: Different pictures.

The Court: The south side of the building?

Mr. Hilger: No, the various parts of the building. I will have the witness identify them. [68]

The Court: The exhibit you had marked as Number 7, that was one photo of the south side?

Mr. Hilger: One photo of the south side exterior.

(Plaintiff's Exhibit 7 was passed to the Jury, as were also the subsequent exhibits introduced.)

Q. (By Mr. Hilger): I show you another photograph and ask you what that depicts, Mr. Jensen?

A. That is the north end of the building. In this part here is shown where our molding was stored.

Q. This was taken from the outside of the building the photographer looking south? A. Yes.

Q. And photographing the north exterior of the building? A. That is right.

Q. You pointed to which portion as the portion in which the moldings and other items were stored?

A. This; that would be the west side.

Q. Or the right-hand side? A. Yes.

Mr. Hilger: I will offer this as Plaintiff's next in order.

(The picture referred to was thereupon re-

(Testimony of Hyrum Jensen.)

ceived in evidence and marked Plaintiff's Exhibit 8.)

Q. (By Mr. Hilger): Mr. Jensen, here is another picture. Will you tell us what that shows?

A. That was the interior taken from the south looking north.

Q. That would be taken in here by where the sawmill set? A. Yes.

Q. And would be looking out towards the north-west? A. That is right.

Q. Between where the photographer was standing and the other end of the building and the wall, the framework, which you can see there on the left-hand side of the picture, what had been stored in that area?

A. That would be where our molding and fencing material would be.

(The picture referred to was thereupon received in evidence and marked Plaintiff's Exhibit 9.)

Mr. Castro: Counsel, did you state when those pictures were taken?

Mr. Hilger: No, I did not.

Q. (By the Court): When were these pictures taken?

A. Shortly after the fire.

Q. What do you mean by that? The next day?

A. I imagine it was a week or such matter.

Q. About a week after the fire?

A. I think it was.

Mr. Hilger: If I can refresh the witness' recol-

(Testimony of Hyrum Jensen.)

lection, these were taken under my direction and it was somewhat later than that, some few months after the fire. But the witness has indicated, and it is my information and the personal observation, that the situation there had not changed during that period. [70]

Mr. Castro: Will you tell us when it was that they were taken?

Mr. Hilger: I would have to refer to my records.

The Witness: There were so many pictures.

Mr. Hilger: It would have been during the fall perhaps, Mr. Castro. They were printed in Portland about three weeks ago from transparencies I have in my file.

Q. I show you another picture, Mr. Jensen, and ask you if you can identify that for us?

A. Yes, that is our upstairs office.

Q. We have not discussed your upstairs yet, Mr. Jensen. We have looked at a floor plan. That would be a floor plan of the ground floor?

A. No, it was up on——

Q. That drawing on the board is the downstairs floor? A. That is right.

Q. Now, there was an upstairs?

A. Yes, there was.

Q. And over what part of the building was the upstairs?

A. That was over all of this portion from here to here (indicating).

Q. By that you are referring to the southeast corner of the building?

(Testimony of Hyrum Jensen.)

A. Yes. And this would be our stairway here. It went up through here. We had a building, a little hallway. It had a [71] door here for one office, a door here for another, and a door back here and, by the way, this had an upstairs over this part here, and also this part here. Now, we are talking about the upstairs, where we had merchandise stored up there also. All of this was two stories in here.

Q. What type and character of merchandise was stored up there?

A. We had plywood and masonite and other types of salable merchandise up there.

Q. Where was the office space upstairs?

A. The office space would be, I think, from here back about to here. That would be one office. And then another office here and one back here.

Q. What type of office work was performed upstairs?

A. That was where our bookkeeper worked in handling invoices and withholding taxes and time and so on was kept upstairs.

Q. Various of the records?

A. Yes, all of the records.

Q. Were any of the office functions such as billing, correspondence and that sort of thing done upstairs?

A. That was performed in the upper office.

Q. This picture you just looked at, is that an accurate picture of the upper office?

A. That is one of them, yes.

(Testimony of Hyrum Jensen.)

Q. Is that the office wherein the records and files upstairs were kept? [72] A. Yes.

Mr. Hilger: I offer this as Plaintiff's next in order.

(The picture referred to was thereupon received in evidence and marked Plaintiff's Exhibit 10.)

Q. (By Mr. Hilger): Here is another picture, Mr. Jensen. Can you tell us what that shows?

A. That is on the inside showing where our sawmill was. You can see part of the big diesel motor, the Cummings that was there. That was one of the biggest type of portable engines that they built.

Q. As you look out beyond that sawmill you see a wall. That would be the west wall of the building? A. Yes, that would be the west.

Q. Between the sawmill and the west wall what would have been stored?

A. That was where some of our molding and fence material was stored.

Mr. Hilger: I will offer this as our exhibit next in order.

(The picture referred to was thereupon received in evidence and marked Plaintiff's Exhibit 11.)

Q. (By Mr. Hilger): Mr. Jensen, I show you another picture and ask you if you can identify that for us? [73]

A. Part of that was on our west side where we

(Testimony of Hyrum Jensen.)

had our molding stored, and there were some shingles, I think asphalt shingles.

Q. Those would be looking toward the area where the sawmill had been stored?

A. No, that would be in the opposite direction, right back of it. The sawmill would be ahead of this, and this is in back of it there.

Q. The open spot at the top——

A. That was caused by the fire. It burned that open.

Q. It burned the roof off?

A. Yes, it did. It burned so bad it caved in.

Mr. Hilger: I offer this as Plaintiff's next in order.

(The picture referred to was thereupon received in evidence and marked Plaintiff's Exhibit 12.)

Q. (By Mr. Hilger): Mr. Jensen, can you identify this picture for us?

A. Yes, that was on the inside.

Q. It would be on the west side of the building?

A. Yes, showing a little of the carriage, and where moldings and fence material had been stored.

Q. The floor area appears down toward the bottom of the picture? A. That is right. [74]

Q. And that would have been the floor on which this storage was? A. Yes, it was.

Mr. Hilger: I offer this as Plaintiff's next in order.

(The picture referred to was thereupon re-

(Testimony of Hyrum Jensen.)

ceived in evidence and marked Plaintiff's Exhibit 13.)

Q. (By Mr. Hilger): Can you identify this photo, Mr. Jensen?

A. That is also in the middle part where our lumber was stored.

Q. Would the photographer have been standing in the southwest corner for the taking of that picture? A. Right, yes.

Q. He would have been looking out from here across north? A. Yes.

Mr. Hilger: I offer this as Plaintiff's next in order.

(The picture referred to was thereupon received in evidence and marked Plaintiff's Exhibit 14.)

Q. (By Mr. Hilger): Can you identify this photograph for us, Mr. Jensen?

A. That was leading up to the upstairs offices, in that neighborhood there.

Q. That would have been in the east part of the building? [75]

A. And in the southeast.

Q. That would have been to the east of the——

A. Going up those stairs and over.

Q. It would have been to the east of this dividing partition? A. Yes.

Mr. Hilger: I offer this as Plaintiff's next in order.

(The picture referred to was thereupon re-

(Testimony of Hyrum Jensen.)

ceived in evidence and marked Plaintiff's Exhibit 15.)

Q. (By Mr. Hilger): Mr. Jensen, here is a final photo. Can you identify that for us?

A. That is also a storage place where lumber was stored or moldings and so on.

Q. That would have been the storage area over next to the sawmill? A. Yes.

Q. And this appearing in the right portion of the picture behind the post would be a portion of the remains of the sawmill?

A. Yes, it would. There is a carriage there, see? There is the feed.

Q. This picture then was taken from the east side of this partition? A. Yes.

Mr. Hilger: I offer this as Plaintiff's next in order. [76]

(The picture referred to was thereupon received in evidence and marked Plaintiff's Exhibit 16.)

Mr. Hilger: I am just about to start in a new area. Do you wish to open it up before the recess?

The Court: The Jury has not finished looking at the photographs. You might pursue it a little bit and then we will take a recess.

Q. (By Mr. Hilger): Mr. Jensen, did you go upon the premises at all after the fire?

A. I beg your pardon?

Q. Did you go upon the premises at all after the fire? A. Yes, I did.

(Testimony of Hyrum Jensen.)

Q. When did you first arrive on the scene after the fire started?

A. I was out at lunch at the time. I had left the place about five minutes after 12, which we do every day. We close the place up completely during the noon hour. And I had gone down on Broadway for lunch, and I got back about half past.

Q. What did you see when you arrived inside of your place at 12:30?

A. I heard the sirens several blocks away. We kept driving up that way. We could see a big pillar of smoke. I got within, I think, about two blocks. There was so much traffic that I couldn't get through, and there was one of the police officers that I knew very well. He said, "You follow me and I will get [77] you through." So he did, and we went around through some alleys, cut back over, and I got back, and that was the first I knew of it.

Q. What was the first thing you did when you got to the fire?

A. Well, I tried to run over to the office to get some records and stuff out of there. I had a lot of titles and one thing and another, equipment in there, and one of the police officers grabbed me or else I would have gone in there anyway.

Q. At that time was the building burning?

A. It was all on fire. The smoke was rolling out of the front doors, where the office was. There was no fire at that particular spot but heavy smoke.

(Testimony of Hyrum Jensen.)

Q. Was the fire-fighting apparatus in operation at that time?

A. I think I seen them put the hose on just as I came up for the first time.

Q. You observed no water being directed at the fire as you came up?

A. I hadn't seen it. It looked to me like they put it there at that time, and I was told afterwards that was the first water.

Mr. Castro: I object to this as hearsay.

The Court: What the witness was told may go out.

Q. (By Mr. Hilger): After the fire was put out, did you do anything else in connection with it during the existence of [78] the fire, that is, yourself personally?

A. Yes, we went in and looked things over.

Q. When was this? During the fire?

A. Right after the fire.

Q. You mean after it was put out?

A. Yes. Mr. McBeth, one of the firemen, was there and he asked me how I thought it caught fire, and I told him I didn't know. I said, "I think somebody set it afire." I said, "We had better get an investigator." I told him and the fire chief. In the meantime we walked outside. Mr. Moser—he is a truck dispatcher that is on the opposite corner—two fellows, truck drivers, told him that they had seen two men——

Mr. Castro: Just a moment.

(Testimony of Hyrum Jensen.)

The Court: This will be hearsay, I'm afraid, counsel.

Mr. Hilger: I'm afraid that would be, your Honor. I want to establish this fact:

Q. Did you receive information concerning anyone being seen around the place?

A. Yes, I did.

Mr. Castro: I object to that as hearsay.

Mr. Hilger: I just want to find out if he received that information.

Mr. Castro: I object to that as hearsay. What information he may or may not have received in the absence of the defendant, your Honor, I believe is hearsay. [79]

The Court: As long as he does not say what it was, he may use that fact as a preliminary to something that he did. I can't tell.

Mr. Hilger: Precisely, your Honor.

The Court: The witness is not to testify to what he heard, but he did receive some information and that much I will allow.

Q. (By Mr. Hilger): You received some information concerning someone seen at the fire, and thereupon what did you do? A. Yes, I did.

Mr. Castro: Just a moment. Your Honor, I object to that as calling for hearsay.

The Court: I will rule on it after I hear his answer to the next question.

Q. (By Mr. Hilger): What did you do with the information so received?

A. I called Mr. McBeth, the fireman, and the

(Testimony of Hyrum Jensen.)

chief of the firemen, and a couple of police officers and told them.

The Court: All right. You gave the information that you received to some police officers.

The Witness: Yes, I did, and the fireman, Mr. McBeth, and I told him——

The Court: You can't say what you told them.

Mr. Hilger: Without saying what you said——

The Witness: I will keep still. [80]

Mr. Hilger: You passed on the information you received.

The Witness: Okay.

The Court: I will allow the answer to stand for the purpose stated. The witness received some information and passed it on to the police officers.

Q. (By Mr. Hilger): Mr. Jensen, at any time since the fire have you received any information from any source regarding the origin of this fire which could have been passed on either to the insurance company or to the——

Mr. Castro: I object to that as uncertain and hearsay on its face, your Honor.

The Witness: I didn't hear the question.

Mr. Hilger: I haven't finish the question.

The Court: Just a moment. In your opening statement you refer to the fact that you raised as a defense that there was a breach by the insured in not passing on, not giving correct information to the insurance company.

Mr. Castro: Concerning invoices; that was the only statement.

(Testimony of Hyrum Jensen.)

The Court: That is the only thing you referred to?

Mr. Castro: That is right. That is the only argument I made on that information.

The Court: Read the question.

(Question read.) [81]

A. Yes.

The Court: You will have to reframe the question.

Q. (By Mr. Hilger): Have you ever received any information since the fire concerning its origin which you have not passed on to the insurance carrier or to the investigating public officers?

The Court: Assuming the objection to that question, I will overrule it.

A. I have.

Mr. Hilger: The question is have you received any information which you have not passed on?

A. No, I have not. Every time——

The Court: You have answered it. You see, if you start talking some more, it gives the lawyers a chance to fuss around some more. Just answer the question.

Q. (By Mr. Hilger): Mr. Jensen, have you ever since the fire submitted to an examination under oath at the request of the insurance company?

A. I'm sorry, I didn't hear you.

Q. Have you at anytime since the fire submitted to an oral examination under oath at the suggestion of the insurance carrier?

A. Yes, I have.

Q. That was on October 12, 1956?

(Testimony of Hyrum Jensen.)

A. I think that is right.

The Court: I think perhaps we might take the [82] recess at this time. Members of the Jury, we will take the usual afternoon recess at this time.

(Recess.)

Q. (By Mr. Hilger): Mr. Jensen, after the fire did you receive any instructions from a representative of the Boston Insurance Company regarding the care of the inventory that was damaged in the fire? A. Yes, sir.

Q. If so, from whom?

A. Mr. Troy and Mr. McBeth of the local city fire department, and Mr. McMullin.

Q. Mr. McMullin is with the General Adjustment Bureau? A. Yes.

Q. They were adjusting this fire for the Boston Insurance Company? A. That is right.

Q. When did you receive your first such instruction after the fire? A. When did I what?

Q. When did you receive your first instruction after the fire from any of these gentlemen?

A. I think we sat up with them two straight nights.

The Court: When was it?

Q. (By Mr. Hilger): When did you get your first instruction? [83]

A. About two days after the fire.

Q. Who gave you that particular instruction?

A. Mr. Troy and Mr. McMullin.

Q. McMullin? A. McMullin, yes.

Q. What was that instruction?

(Testimony of Hyrum Jensen.)

A. They told us to go up and get some signs "Keep Out" and we put some boards on it, and they said they would take over from then on.

Q. Did you put the signs on as requested?

A. I did, with the help of Mr. McBeth.

Q. Did you put boards on?

A. The fire chief had already put most of them on. I put some more on.

Q. Prior to receiving that instruction what had you done in connection with caring for the inventory that had been damaged?

A. Two nights before we sat up with it all night to take care of it so somebody wouldn't steal it, and after that we didn't. We just let the insurance company handle it.

Q. That was after your instruction from Mr. Troy and Mr. McMullin? A. Yes.

Q. Did you receive any further instructions thereafter from any of these gentlemen whom you have named? [84] A. Yes, I had.

Q. When was the next such instruction?

A. I imagine it was about a week.

Q. Who gave you that? A. Mr. McMullin.

Q. What did he tell you to do?

A. He told me he had no authority to let me go in and take any of my records or anything, leave them in there, because all the doors was busted out, windows and everything, and people were striking it overhead.

Q. Had you made any request to remove or preserve your records?

(Testimony of Hyrum Jensen.)

A. Yes, I had; yes, I had.

Q. Did you have any further instructions from any of these gentlemen after the second one here that you referred to? A. Yes, I had.

Q. When was the next one?

A. Seems like it was sometime in August, when there was a couple of firemen came down and I asked them if we couldn't do something with this, clean it up. I wanted to go back in it again.

Q. Are you talking about the two firemen?

Q. (By the Court): Who was this conversation with?

A. With a couple of insurance men.

Q. Who were they? [85]

A. I don't recall their names. Do you remember, Mr. Hilger?

Mr. Hilger: No, I do not. I do not think I was present at that discussion, Mr. Jensen.

The Witness: Anyway they represented themselves to me as from the insurance company. They did tell me their names but I don't remember them.

Q. What was the object of that discussion, Mr. Jensen?

A. I just told them I would like to go back in business again if they would let me do something with the building, tear it down, and they said no. So that was all there was to it. I tried to get my records out, and every day you could see where some of the merchandise was missing.

Q. You caused an inventory of the merchandise

(Testimony of Hyrum Jensen.)

to be made for the purpose of the proof of loss, did you not? A. Yes, I did.

Q. Is any of that missing inventory included in that proof of loss?

A. No, I instructed Mr. Fox and my son Dee to go in—

Mr. Castro: This is hearsay, your Honor.

Q. (By Mr. Hilger): I only want to know at this time, Mr. Jensen—perhaps it will be further developed upon cross examination—but was any of the inventory that you believe disappeared after the fire, was any of that included in your claim for payment from the insurance company?

A. No. [86]

Q. Just the merchandise that was actually there to be counted?

A. That is right, other than the molding, and that was burned and we couldn't count that.

Q. That, of course, disappeared in the fire?

A. Yes.

Q. I'm talking about anything that disappeared after the fire. A. That is right.

Q. None of that was in your claim against the insurance company? A. No, sir.

Q. Has any demand been made upon you for the production of any of your records by the insurance carrier?

A. Not until, I think it was, October.

Q. Of 1956? A. Yes.

Q. At that time did you produce your records?

A. I did.

(Testimony of Hyrum Jensen.)

Q. Of what did they consist at that time?

A. Well, they was all wet and strung all over the building down there, and I picked up everything I could find that had writing on and put them in boxes and put them in storage.

Q. That was not until this past summer that you picked them up? [87]

A. [No answer in transcript.]

Q. Getting back to last October, what did you do at that time in connection with making them available to the insurance carrier?

A. I would try to cooperate with them.

The Court: What did you do?

Q. (By Mr. Hilger): Did you authorize anyone to go down and look at the records that were there?

A. Well, the insurance people, they had asked me several times if I had done anything with them, and I told them no, and they was always down there looking at them and getting what they wanted at all times.

Q. Do you know of any specific instances when they were down there looking at your records?

A. Yes.

Q. When was the first such instance?

A. I remember Mr. McBeth and Mr. McMullin came down and was taking pictures, and my son Dee and I walked up there, and they were taking pictures in there, and they were taking pictures all over, on empty shelves, and so on, and I asked them why they didn't take pictures——

(Testimony of Hyrum Jensen.)

Q. I am speaking now in relation to the records, Mr. Jensen. When to your knowledge did they first make reference to your records?

A. That was just last summer sometime.

Q. In October of 1956 did they send anyone up at that time [88] to look at your records, go down there with anyone from my office to look at the records? To refresh your recollection, Mr. Jensen, as to dates that was prior to your examination under oath last October.

A. No.

Q. You do not recall that?

A. No, I do not.

Q. Have you ever refused to make available your records at any time when you have been requested?

A. No, sir, I have not.

Q. Do you have in your possession or in your custody or under your control any records which you have not made available upon request to the insurance company?

A. No, sir, I picked up everything that I could find that had writing on and took it up to your office.

Q. That was in approximately July of this year?

A. I think it was.

Q. And if a request had been made last October, you did not refuse it?

A. No, I had not.

Q. Do you recall Mr. Stearns and Mr. Bridle of Peat, Marwick, Mitchell & Company coming up about a week prior to your examination under oath and going down with me to your office?

(Testimony of Hyrum Jensen.)

A. Yes, I do.

Q. At that time the records were examined by Mr. Stearns and Mr. Bridle? [89] A. Yes.

Q. And that was subsequent to a letter of demand that had been made upon you by the insurance carrier? A. That is right.

Q. And at that time were all the records that you had in your custody or control made available to myself, Mr. Stearns and Mr. Bridle?

A. Yes, they were.

Q. And now, you submitted to an oral examination under oath about a week after the accountants were up to look at the records. At that time did you reveal your principal suppliers to the insurance carrier? A. Yes, I did.

Q. You named them by name?

A. Yes, I did.

Q. Have you ever contacted any of those suppliers in regard to their supplying information to the insurance company regarding your purchases from them?

A. I have talked to them on different occasions.

Q. Have you indicated the possibility that they would be called upon or could be called upon to provide information concerning your purchases?

A. I think I did.

Q. Who was that? [90]

A. That was Eureka Redwood.

Q. Did you see Mr. Henning at Rice Supply, or talk with him in that connection?

A. Yes, I did, that is right.

(Testimony of Hyrum Jensen.)

Mr. Castro: What was that name?

Mr. Hilger: Mr. Henning of Rice Supply.

Q. At the time of this fire, Mr. Jensen, was there any equipment or items in the building that were not covered by insurance?

A. Yes, there was. I had a big fork lift that we handled lumber with.

Q. Is that a piece of equipment that is mobile, that can be moved around? A. Yes, it is.

Q. It is equipped with tires?

A. Yes, a fork lift that would raise a thousand feet of lumber eight or nine feet, that we used for handling lumber in the yard.

Q. Transporting it from one place to another?

A. Yes. That was in the shed.

Q. Is that ordinarily used inside or outside?

Q. That was used outside. It happened by misfortune it was left in there that night.

Q. What is the value of that piece of equipment?

A. About \$2500, I figured. It was used. It had been used. [91]

Q. Was there any fire insurance on that piece of equipment?

A. No, there was not, not that I know of.

Q. If you knew of any you would make a claim of it?

A. I should have run it out the night before.

Mr. Castro: I move that that be stricken, your Honor.

The Court: Yes, it may go out.

(Testimony of Hyrum Jensen.)

Q. (By Mr. Hilger): What other items, if any, were there in the building that were not covered by insurance?

A. There was a lath machine, a bolter and an edger.

Q. What would be the value of those pieces of equipment? A. About \$1400.

Q. And that was not covered by insurance?

A. No, it was not. I just put that in.

The Court: You have answered. It was not covered by insurance.

The Witness: No.

Q. (By Mr. Hilger): Was there any other equipment or items that were not covered by insurance in the building?

A. Yes, there was quite a bunch of truck tires, electric welder——

Q. How many truck tires about, as well as you can recall? A. I would say seven or eight.

Q. Do you know the cost of a truck tire of that description?

A. Around about \$135 or \$140 apiece.

Q. They are for the large diesel type of trucks?

A. Yes. [92]

Q. Were those tires covered by insurance?

A. No.

Q. Was there anything else in the building not covered by insurance? I believe you mentioned a welder when I interrupted.

A. Yes, there is a welder that belonged to one of my sons; an acetylene outfit; a lot of oil filters,

(Testimony of Hyrum Jensen.)

oil baths, they call them, air pump, pressure guns, and a lot of equipment like that, that I couldn't mention that was in there. A lot of high-priced tools. They were not insured.

Q. Mr. Jensen, when you purchased this piece of property at Third & Commercial, what did you pay for it?

A. I think it was about \$42,250, somewhere around in there. I am not right sure.

Q. Do you know the value of the building that was on the premises at the time of the fire?

A. Yes, after I remodeled it and everything it was between \$30 and \$35,000, the building was worth.

Q. How much fire insurance was carried on that building at the time of the fire? A. \$10,000.

Q. Was that the entire extent of the fire insurance on the building?

A. Yes, that was all the fire insurance we had on the building. [93]

Q. (By the Court): Was that carried by the same company or by a different company?

A. No, that was a different company. They paid off.

Mr. Castro: I would like to make a statement, your Honor, that that was covered by the Pennsylvania Insurance Company, which paid off to the Crocker Anglo Bank on a loan basis.

Mr. Hilger: As a loss payee.

The Court: They had the insurance policy with a loss-payable clause to the bank?

(Testimony of Hyrum Jensen.)

Mr. Castro: Yes.

Mr. Hilger: There was a deferred balance due on the property, your Honor, and so naturally there was a loss payable.

The Court: The loss was payable on the insurance policy on the building to the bank.

Mr. Hilger: Reference is made back to the analysis of payments to Anna Hess, the \$10,000; that was the proceeds of that policy that was applied on the note representing the unpaid purchase price.

The Court: Go ahead.

Q. (By Mr. Hilger): When did you acquire the Eureka Lumber Company, Mr. Jensen?

A. Sometime in 1953 or 1954. I can't remember. I think it was August of 1954.

Q. August of 1953?

A. Three, yes, that is right. [94]

Q. And do you have a recollection of your operations during the calendar year 1954?

A. About \$5,000.

Q. What are you referring to now by \$5,000? Is that sales net profit?

A. Net profit, our net profit.

Q. Do you recall approximately what your gross sales were during that year?

A. I can't exactly.

Q. What is your best recollection in that respect?

A. Somewhere about \$75,000, but I am not up on that. My son kept those books and I couldn't say.

(Testimony of Hyrum Jensen.)

Q. Do you have a recollection of the gross sales in 1955?

A. I know it more than doubled.

Q. Do you have any recollection of your net profit in 1955? A. I can't recall exactly.

Mr. Hilger: May I have the financial statement that is attached to the deposition of A. J. Franceschi.

Q. (By Mr. Hilger): From time to time in connection with your bank credit did you submit to the Crocker Bank or its predecessor, the Bank of Eureka, financial statements?

A. Yes, I did.

Q. Those financial statements were prepared from your books and records?

A. Yes, they were. [95]

Mr. Hilger: I will offer that in evidence.

Mr. Castro: I object to it as hearsay, your Honor, a financial statement.

The Court: You had better lay the foundation for it as to whether or not it is correct before you offer it.

Q. (By Mr. Hilger): You indicated you submitted these financial statements from time to time prepared from information taken from the books and records. I will show you a financial statement purporting to show financial condition at the close of business on December 31, 1954, and ask you, first of all, if that is your signature that appears thereon? A. Yes, it is.

Q. Are these figures that were inserted there

(Testimony of Hyrum Jensen.)

taken from your books and records maintained in the usual course of your business?

A. Yes, they were.

Q. Will you look at the various figures and items contained thereon and tell us if that is an accurate statement of your financial condition as revealed by your books and records on December 31, 1954?

A. It would be accurate or I wouldn't sign it.

The Court: Was it?

Q. (By Mr. Hilger): Was it? Yes or no.

A. Yes, I am sorry.

Q. I will likewise show you a financial statement purporting [96] to show your financial condition and the result of your operations for the calendar year 1955, and I ask you if that was prepared from your books and records?

A. Yes, it was.

Q. Did you own all the real property that was listed on page 4 thereof, Mr. Jensen?

A. No, I did not. This fresh water property, I never owned that.

Q. Who owned that?

A. That was my son Dee's. He had contracted for it.

Q. I would like to have you look at the remaining items in that financial statement. Incidentally, that is your signature that appears thereon, is it not?

A. Yes, it is.

Q. Tell us whether or not that is accurate, aside from the fresh water property that you refer to, if

(Testimony of Hyrum Jensen.)

that is an accurate statement of your financial condition on December 31, 1955, and an accurate report of your operations for the calendar year 1955?

A. Is this 1955 or 1956?

Q. You are correct. This is June 1st, 1956 as to the balance sheet.

A. That is correct.

Q. Now, there is also a statement of income and expense attached thereto showing or purporting to show the profit and [97] loss from January 1st to December 31st, 1955. Is that an accurate statement of your operations as reflected on your books of account for the period shown? A. Yes, it is.

Mr. Hilger: I will offer these, the statement of December 31st, 1954, as the Plaintiff's next in order——

Mr. Castro: I object to it as hearsay, your Honor.

The Court: I will overrule the objection. The witness has stated this is a true statement of his financial affairs.

(The financial statement referred to was thereupon received in evidence and marked Plaintiff's Exhibit 17.)

Mr. Hilger: And I will offer at this time the financial statement bearing date June 1st, 1956, as the Plaintiff's next in order.

Mr. Castro: I object to it as hearsay, your Honor.

The Court: Same ruling.

(Testimony of Hyrum Jensen.)

(The financial statement referred to was thereupon received in evidence and marked Plaintiff's Exhibit 18.)

The Court: Strictly speaking, I suppose, it might be considered as rebuttal testimony, but since that is only a matter of order of proof, I admit it at this time.

Mr. Hilger: Those are all the questions I have at [98] this time.

Cross Examination

Q. (By Mr. Castro): Is this your signature (handing a document to the witness)?

A. Yes, it is.

Q. And that is your signature to the proof of loss that you have made concerning stock?

A. As far as it was furnished to me it was.

The Court: Is that a different one than the one that has been offered in evidence?

Mr. Castro: I believe that the one in evidence is a photostatic copy of this document, your Honor.

The Court: All right.

Q. (By Mr. Castro): In that proof of loss you claim you had property of a total value of \$63,-549.54.

The Court: Well, it says so in there. What is the next question.

Mr. Castro: That is correct.

The Court: You have asked him whether something isn't in there. Anybody can see that.

Q. (By Mr. Castro): And you claim that you

(Testimony of Hyrum Jensen.)

lost and were damaged in the sum of \$33,549.54 of that property, did you?

A. If I signed this, yes.

Q. That is your signature, isn't it?

Mr. Hilger: He has already answered that question. [99] The document speaks for itself.

The Court: Sustained.

Mr. Castro: He said if he signed that, and that is why I repeated the question to him.

Q. (By the Court): You signed this?

A. Yes, I did.

Q. You have already testified you signed it?

A. Yes, I did.

Q. (By Mr. Castro): Of that property you claim \$7,500 represented one sawmill?

A. I didn't hear you. I am sorry.

Q. In that proof of loss you signed you claimed one part of your loss was a sawmill worth \$7,500?

A. Yes.

Q. You then said that you had hardware material, building material, worth approximately \$5,400?

A. Yes.

Q. And that you had redwood molding and window casings of 60,000 board feet? A. Yes.

Q. And you had fence boards of 35,000 board feet? A. Yes.

Q. And you had lumber outside of the building of the value of \$30,000?

A. I never valued any lumber outside of the building. [100]

Q. In the proof of loss under Exhibit 7 you

(Testimony of Hyrum Jensen.)

claimed, did you not, that you had lumber of assorted widths and lengths outside the building of \$30,000 value?

A. Not outside the building, no.

Q. Did you claim that you had it adjacent to the building?

A. Did I claim what?

Q. Adjacent to the building?

A. It was in the building.

Q. I call your attention to Exhibit C of that proof of loss which you signed. Is there any error in Exhibit C of that proof of loss?

Mr. Hilger: I am going to object to this as being immaterial to any issue in the case. The proof of loss itself states this is inventory undamaged by the fire. A proof of loss is inadmissible in and of itself to prove the loss for or against. It is merely admissible in evidence to prove compliance with policy requirements, and no claim of loss was made for the \$30,000 of lumber outside the building in the open yard that was not damaged, and it would be irrelevant to pursue the subject.

Mr. Castro: It is all part of the same proof of loss that was filed, your Honor.

The Court: Why don't you read this before you answer the question. It says here "Inventory undamaged by the fire," and it refers to some lumber stored in a lot adjacent to the building, \$30,000.

The Witness: That is an error. It was stored in the building. May I say when I was young I never had a chance to go to school.

(Testimony of Hyrum Jensen.)

Mr. Castro: I move to strike that as not responsive to any question.

The Court: That happens to a lot of people. You don't have to make any explanation. I understood your testimony to be that in the yard adjacent to the building that there was material stored there, too.

The Witness: No—there was material stored in the yard, plenty of it, outside, but we didn't make claim for it.

Q. (By the Court): That is what it says here. I will read it to you. It says, "Inventory undamaged by fire, lumber, assorted widths, lengths and grades, stored in yard adjacent to the building." So if it was undamaged by the fire, you were not making any claim for it?

A. That is right.

Q. Then there was material there that was outside the building but it was undamaged, and you did not make any claim for it?

A. That is right, yes. I'm sorry. I didn't understand you.

Q. (By Mr. Castro): Who made out that proof of loss?

A. I hired a Mr. Fox and my son Dee.

Q. Did they present it to you for your signature?
A. Yes, they did. [102]

Q. Did you read it over before you signed it?

A. They told me it was correct, and I took their word for it and signed it.

(Testimony of Hyrum Jensen.)

Q. In the proof of loss it refers to 66,000 board feet of redwood molding, \$14,000?

A. That sounds about right.

Q. Where did you buy that molding?

A. Eureka Redwood and Arcata Redwood.

Q. When did you buy it from the Eureka Redwood? A. Oh, within the last two years.

Q. When did you buy any from the Arcata Redwood? A. The last two years.

Q. Do you have any invoices from the Arcata Redwood Company to show any purchase of such redwood? A. We did have.

Q. Do you have any at the present time?

A. No, I do not.

Q. Have you asked them to give you a copy of any invoices concerning redwood that you purchased from the Arcata Redwood?

A. My son did, yes.

Q. Did you? A. No.

Q. Did you get copies from them?

A. We did get copies, yes.

Q. Where are the copies? [103]

A. They were destroyed in the fire or else the insurance people picked them up for records.

Q. When did you ask them for those? Was it before or after the fire?

A. I didn't ask. My son did.

Q. Was it asked for before or after the fire?

A. It would be after the fire because we had them before the fire.

Q. You asked for them after the fire?

(Testimony of Hyrum Jensen.)

A. Yes, it would be after the fire.

Q. And they gave them to you after the fire?

A. I don't know.

Q. Did they give them to you after the fire?

A. I don't know. No, not as I know of. That wasn't my part. My son was keeping my books and the financial deal, and that was his duty.

Q. Did you ask the Eureka Redwood Company after the fire for any invoices? A. Yes.

Q. Did they give you any invoices?

A. Yes.

Q. Where are the invoices they gave you?

A. I think Mr. Hilger has them.

Mr. Castro: Do you have them, counsel?

Mr. Hilger: You have previously been supplied with [104] all of them.

Mr. Castro: Which ones are they, counsel, so there will be no mistake in the record if they are here?

Mr. Hilger: All those that were found were turned over to you forthwith. Then you asked that you be permitted to contact the redwood company in San Francisco, and you got more invoices than I have got.

Mr. Castro: Were those the invoices that were referred to in the deposition of Haley J. Bertain, which was taken in your office on September 19th of this year?

Mr. Hilger: That is correct.

Mr. Castro: May we have those, your Honor.

(Documents handed to counsel.)

(Testimony of Hyrum Jensen.)

Q. All the redwood that you purchased for molding from the Eureka Lumber Company amounted to approximately 20,000 board feet, did it not?

A. It amounted to about 200,000 board feet.

Q. I call your attention to the deposition of——

Mr. Hilger: I will object to that as an improper use of a deposition. The testimony that others might give is entirely immaterial to the truth or lack of truth of this witness.

Mr. Castro: Then will you produce those invoices? You said they were here. That is why I asked about the deposition.

Mr. Hilger: Counsel was present at the taking of [105] that deposition. Counsel had access to Mr. Klenz of the company in San Francisco. Mr. Bertain of the Simpson Redwood Company said he would make sure Mr. Castro could get all the invoices which were in the San Francisco office after the taking of this deposition. If counsel hasn't gotten them, that is counsel's unfortunate situation. We had a summary of those at the taking of this deposition of Mr. Bertain, which he had received by telephone in Eureka upon the occasion of the taking of this deposition. The use of that summary was objected to by counsel, and it was therefore suggested that he obtain his invoices, and he was told where he could get them. I have no invoices.

Q. (By Mr. Castro): Mr. Jensen, between August of 1955 and June of 1956 isn't it a fact that all redwood molding which you purchased from the

(Testimony of Hyrum Jensen.)

Eureka Redwood Company amounted to approximately 21,000 board feet?

A. No, it amounted to probably 200,000. We bought molding stock from other people, too.

Q. Isn't it a fact that that redwood molding which you purchased from the Eureka Redwood Company was what they call factory cuts?

A. That is true, factory odds.

Q. Under factory cuts isn't it understood to mean reject molding? A. That is right.

Q. Didn't you pay approximately \$20 a thousand for the [106] rejects that you purchased between August, 1955, and June of 1956?

A. All the way from \$20 to \$75 a thousand.

Q. Isn't it a fact that you only paid \$20 a thousand? A. We paid \$20 to \$75 a thousand.

Q. You paid \$75 a thousand for what from the Eureka Redwood Company?

A. For some of the molding.

Q. From whom?

A. Different people—Eureka Redwood, Arcata, Holmes Eureka, Vandermeer.

Q. Do you recall your examination under oath which was taken about two months after the fire or three months after the fire? A. Yes.

Q. I ask you to look at page 51, lines 8 to 11. Will you read those questions and answers to yourself? Have you read those four lines?

A. Yes.

Q. Did I ask you these questions on October 12th, 1956, in the presence of your counsel, Mr.

(Testimony of Hyrum Jensen.)

Frederick Hilger, page 51, beginning at line 8 to 11:

“Q. Where did you buy your moldings?

“A. Eureka Redwood. We made a lot of that, too, ourselves.

“Q. Cash or credit basis with Eureka Redwood?

“A. We bought that through Hill & Morton.”

Did you give those answers to those questions?

A. That is correct. I answered it as you read them, that is correct.

Q. You didn't tell me any place else that you bought it at that time, did you?

A. Perhaps I didn't remember, recall. I told you every one I could remember.

Q. Those were green, were they not?

A. We bought green and dry.

Q. How many did you buy green between August, 1950 and June of 1956?

A. That I can't remember.

Q. Approximately? A. I can't remember.

Q. From the Eureka Lumber Company. Can you give us any estimate on that? A. No.

Q. Can you make molding from green redwood?

A. That was kiln-dried that we bought.

Mr. Castro: I move to strike it out as not responsive to the question.

The Court: It is not responsive.

Q. (By Mr. Castro): Can you make salable molding from green redwood? [108]

A. We made molding stock at times from green redwood, if the buyer desired green stock, and he would run it through his kiln dry.

(Testimony of Hyrum Jensen.)

Q. Do you make redwood molding from green redwood? A. We have, yes.

Q. Did you have any green redwood on your premises at the time of this fire?

A. I believe we did.

Q. Where did you keep it?

A. In the yard, or in the back yard. I think there was a little green in the shed.

Q. Where did you keep the green redwood that you say you had in the back yard?

A. Different places in the yard. Most of it was across the street.

Q. When you are talking about the back yard are you speaking of a position outside——

A. Out in the open.

Q. Outside of this building which is in the diagram? A. Yes.

Q. How much green redwood did you have outside the building at the time of this fire?

A. That I can't tell. I can't remember.

Q. Approximately?

A. I can't remember. [109]

Q. Can you give us any approximation?

A. No.

Q. How much of an area do you need to store 66,000 board feet of lumber?

A. Not very much if you pile it up high enough.

Q. How high would you pile it?

A. Oh, six, seven or eight feet, ten feet, thirteen feet at times.

Q. How wide an area?

(Testimony of Hyrum Jensen.)

A. They run four feet wide.

Q. And for what length?

A. It all depends, from four feet up until twenty, twenty-two.

Q. This 66,000 feet of redwood molding that you talked about, where was it located in the building?

A. In this part right here (indicating). It was located along in here, up to the sawmill, down through here, and there was a pile of fence stock over here in the green, and also piled here back of the door and down through here, clear to this door. Then there was some piled right in here. We had run a truck in here, and we had throwed the lumber that was on this side over on this side.

Q. Will you draw a red line along the west side of that shed where you say you had redwood molding?

A. No, I haven't drawn any line. I am showing you where it is. [110]

Mr. Castro: May we have the witness draw a line where he has indicated it was along the west side of that shed, the redwood molding?

Q. (By the Court): Why don't you want to draw?

A. I would just as soon draw a line if it is necessary.

Q. I think you had better answer his question.

A. It won't hurt to do it twice. Okay. We had stock up in here (indicating).

Mr. Castro: Would you make a line so it will be seen, sir?

(Testimony of Hyrum Jensen.)

A. Do you want me to write a couple of times on it? Do you want me to show you where all the molding was, how far it extended toward Third Street? I don't know how far it would be. It would be like from this door here, long enough to take a truck. It would be about to here, if I remember correctly.

Q. How far out did it extend from the wall?

A. This was piled to the wall.

Q. How far out was it from the wall?

A. As far as I remember it ran all the way from four to ten feet.

Mr. Castro: May we mark that redwood molding, your Honor, on the diagram?

(Diagram marked.) Mark it kiln-dried redwood.

Q. Was it molding?

A. Molding and baseboards, and molding for door sashes. [111]

Q. You say it extended about how far out from the wall? A. I can't tell you exactly.

Q. Approximately?

A. I would say six, seven or eight feet.

Q. Then did it extend along the west side of the wall right to the end of the building?

A. Yes, it did.

Q. Did it extend beyond the edge I am pointing to?

A. There was a door right in there. We had that open.

Q. That door was kept open at all times, wasn't it? A. Yes, I think it was.

(Testimony of Hyrum Jensen.)

Q. How high did you have the redwood along the west wall?

A. I don't remember how high that was.

Q. Approximately? A. I don't remember.

Q. Was it as high as your knees, your waist, or was it higher?

A. I can't remember. I know there was redwood piled all the way along there.

Q. Approximately how high?

A. I don't remember.

Q. Where is the next point that you had the redwood molding stored?

A. We had redwood molding sitting beside our sawmill, about in here back of this door, clear back up in here, where we had [112] fence material in this corner, and there was fence material strung in between this molding, too. It had been sorted out, but it had laid there for the last two years or such a matter, and we had sold pieces now and then, and we had scattered it around a little bit.

Q. Will you draw a red line where you state you had redwood molding along the east side of the shed?

(The witness indicated.)

Mr. Castro: May we mark that redwood molding, your Honor?

The Court: Very well.

Q. (By Mr. Castro): What was the width of this redwood molding?

A. I don't remember how wide that side was.

Q. How far did it extend out from the wall?

(Testimony of Hyrum Jensen.)

A. Right to the wall.

Q. How far did it extend out from the wall?

A. I don't remember how far it did.

Q. You indicated that on the west side it extended from six to eight feet?

A. Yes, that's right.

Q. Did it extend out six to eight feet on the east side?

A. I don't remember whether it was the same length or not.

Q. Will you give us an approximation of how far it extended out? [113]

A. No, I can't. I don't remember exactly.

Q. Can you give us an approximation as to the height of the redwood on that side?

A. It varied in height. It would run from, I would say, four feet up to eight or nine feet.

Q. How big were the sawmill tracks?

A. It was 40 feet long, 10 feet wide.

Q. What did the tracks sit on?

A. It sat on 4x12—or 12x12, I believe it was.

Q. Did the sawmill start at the front side of the building?

A. Yes, it did.

Q. And then it extended back for the length of the logs some 40 feet?

A. It was out the front door probably a couple of feet. It couldn't go inside.

Q. Would you say the logs extended out onto the walk area?

A. Yes. There wasn't any walk, just out of the

(Testimony of Hyrum Jensen.)

door. We had to push the door back a little to close it.

Q. How far out did those logs extend into the walkway? A. I would say a couple of feet.

Q. And then they extended toward the rear of the building for approximately 40 feet?

A. Yes, they did, about 38 feet or something like that.

Q. When you looked at the front of the building could you see the logs sticking out? [114]

A. I beg your pardon. I didn't hear you.

Q. When you looked at the front of the building and before the fire did you see the logs sticking out? A. I think I did, yes.

Q. And they were sticking out about two feet?

A. As near as I can remember. The door would stick out a little before it would close, somewhere around two feet, I would think.

Q. Were those logs destroyed in the fire?

A. They were burned very bad so they weren't usable.

Q. Were they burned up so they were shorter than 40 feet in length?

A. I never noticed that.

Q. You didn't notice that?

A. No, sir, I haven't.

The Court: Mr. Castro, I think probably we had better suspend. I notice practically all the jurors are from out of San Francisco and there is always a little transportation problem involved. So I will endeavor to adjourn before 4:30 as best we

(Testimony of Hyrum Jensen.)

can, depending upon what the testimony is and what the status of the case is at the time. We will reconvene tomorrow morning at 10:00 o'clock, Ladies and Gentlemen of the Jury.

(Whereupon an adjournment was taken until 10:00 o'clock, Wednesday, September 25, 1957.) [115]

Wednesday, September 25, 1957—10:00 o'clock a.m.

The Clerk: Jensen versus Boston Insurance Company for further trial.

Mr. Hilger: Ready for the Plaintiff.

Mr. Castro: Ready for the Defendant.

HYRUM JENSEN

the Plaintiff herein, was recalled as a witness on his own behalf, and having been previously duly sworn testified as follows:

Cross Examination—(Continued)

Q. (By Mr. Castro): Mr. Jensen, did you file a personal income tax return with the United States for the calendar year 1956? A. We did.

Q. When you say "we did," whom do you mean by "we"? A. I did.

Q. Where did you file it? A. Santa Rosa.

Q. Did you pay any tax?

A. No, I asked for an extension until I had a fire settlement.

Q. Did you file a tax return for the calendar year 1955 with the United States Government?

(Testimony of Hyrum Jensen.)

A. Yes, we did—I did.

Q. Where did you file it?

A. I think that was sent here to San Francisco. My [116] bookkeeper sent it. We had asked for an extension then due to the lumber we lost in the flood of 1955.

Q. With reference to the redwood molding, yesterday we were talking about the sawmill and whether or not it extended out onto the street.

A. As far as I remember, it did.

Q. You recall that it extended out about two feet?

A. Something like that.

Q. Was the position of that sawmill changed at anytime after the fire?

A. I beg your pardon?

Q. Was the position of that sawmill changed at any time after the fire?

A. No, it could have been changed a few days before the fire due to the fact that I had rented space to another man that was doing some work on a portable sawmill, and he may have pushed it in in order to close the doors so he could keep his tools locked up in front.

Q. How far did he push it in the building?

A. I don't know that he did. I say he may have done so.

Q. I show you a photograph taken on August 10th, 1956. Will you examine it? Does that photograph show the front of the Eureka Lumber Company building following the fire?

A. It shows it after the fire, yes.

(Testimony of Hyrum Jensen.)

Q. Does that show the doorway in which the sawmill was [117] located? A. Yes, it does.

Q. Is that doorway the doorway to which I am now pointing? A. Yes, it is.

Q. May we mark that "sawmill"? Now, the front door is also shown in that photograph, is it not?

A. The front office door, yes.

Q. And that is the door which is marked "door" on the diagram?

A. That is the office door.

Q. Does that photograph refresh your recollection as to whether the sawmill was extending out beyond the sidewalk at the time of the fire?

A. Yes, I can see where the ends of the sawmill, the timbers are setting right here (indicating). It looks about even with the building. Evidently the fellows that rented the building had pushed it in so they could close the door.

Mr. Castro: At this time we would offer this photograph in evidence as Defendant's next in order, your Honor.

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit C.)

Q. (By Mr. Castro): Was that sawmill an operating sawmill? A. Yes, it was.

Mr. Castro: May we show this photograph to the Jury, your Honor? [118]

The Court: Yes.

Mr. Hilger: Counsel, I will object to the last

(Testimony of Hyrum Jensen.)

question that was asked, "Was it an operating sawmill," as being indefinite as to time.

Q. (By Mr. Castro): During the month of June, 1956, was this sawmill an operating sawmill?

A. It was ready to be taken out of there and to be used as a portable sawmill. It had never been operated at its present position.

Q. Was it connected with power?

A. Yes, it was.

Q. But it had never been operated?

A. We had tested it and sawed a couple of boards just to see how everything worked.

Q. You referred to the redwood molding being in two places that you marked on the diagram. I believe you referred to it at a third place.

A. Yes, and a fourth. You stopped me before I had a chance to show you.

Q. We will get them all. You put down where the third place was.

A. Right along in here (indicating), and we'll say the sawmill here. We had a platform which had molding and lumber laying on top of this that extended nearly up to the front of the sawmill which the carriage had pulled up to this end, and [119] this was all filled with lumber taken from over here where they had put it in for the little sawmill we built, to put on the sawmill.

I would like to mark, while we are at it, that there was also molding piled up in here and down here, and also down to where the diesel motor sat,

(Testimony of Hyrum Jensen.)

which was back over this way, about like that (indicating).

Q. Mr. Jensen, you have indicated starting at this point there was a stack of redwood molding.

A. Not by the door. It was off to the side of the door, and from this point over there was molding, and there was molding in between the two doors, and there was fence material up in here between this and that door, between here and there (indicating).

Q. Mr. Jensen, this map is drawn to a scale of one inch to three feet, and I am trying to locate the stack which you have indicated as being in this approximate position. Was there a stack a redwood molding in this position?

A. I don't know whether that was redwood molding or it could have been fence material. I'm not sure.

Q. You drew a line starting from this point, which I will designate—your Honor, may we designate it as X-1?

The Court: Yes, anyway, you wish.

Q. Southward to a point which I shall ask to be designated as X-3, and then you drew a line eastward to a point which I will designate as X-4. Was redwood stacked from X-1 to X-3? [120]

A. Not from this line. It was stacked—

Q. When you say "this line," would you point out the line that you have reference to?

A. Yes. I would say from here to here (indicating).

(Testimony of Hyrum Jensen.)

Q. May we mark the line you have just referred to as X-5.

A. There was a small space right in here, between this and that. I believe there wasn't too much, although there was lumber laying there on the ground, but I am not sure about the amount. But here back to the door pretty well, so that a lift truck could get in through here, there was also molding' piled in there.

Q. With reference to this area which we have designated at this point as X-5, X-3 and X-4 at the south point, how is that stacked?

A. Some of it was put in piles and some of it was laying rather loose.

Q. When you say some of it was put in piles, do you mean it was just strewn there?

A. In piles—not thrown—it was in a pile.

Q. And you say some of it was loose?

A. Yes, it was. Some of it hadn't been bound.

Q. How high were the piles?

A. I don't remember.

Q. North of that position we have just discussed was there more redwood stacked?

A. There was some. I can't remember exactly how much. [121] Up for a short distance in here, and then from there up here. I think there was some piled in there but how much I don't remember.

Q. Would you mark the point where that stack commences?

A. I have already marked this right in here.

(Testimony of Hyrum Jensen.)

Q. You have drawn a line from X-5 to X-1?

A. That's right. I draw a line in here. There wasn't so much in here, but here there was more.

Q. If I understand your testimony correctly, then, there was redwood stacked from X-1 to X-5?

A. Yes, but how much I don't remember.

Q. How wide was that stacked?

A. That I couldn't remember.

Q. Can you give us an approximation?

A. No, I could not. I just don't remember. I never measured it and I don't know how wide it was.

Q. Was that stacked with stickers?

A. That I don't remember.

Q. Did you have anything in the shed stacked with stickers? A. Yes, we did.

Q. Where was the material that you had stacked with stickers?

A. It was all through the building in different places.

Q. You have indicated that the material from X-1 down to X-3 and X-4 was not stacked?

A. I'm not sure. Some of it was not and some was. [122]

Q. How was it stacked? A. In a pile.

Q. Did it have stickers?

A. Some of it did, I think, and some did not. I'm not sure.

Q. When you are talking about stickers, is that a board upon which the molding is laid?

A. It lays flat on the ground and every so often

(Testimony of Hyrum Jensen.)

we put a sticker through it in order to keep it so it would dry more and keep dry.

Q. How high did you have those piles which you say you had stickers in them between X-1 and X-3 and 4?

A. That I couldn't tell you. I don't remember. I haven't paid enough attention to it.

Q. Didn't you say that you were in there looking this inventory over a week or ten days before this fire to determine whether or not you could supply an order you thought you were going to get?

A. That's right, I did.

Q. Did you look at the inventory?

A. The piles of lumber that was in the building do you mean?

Q. Yes. A. Yes, I did.

Q. And you can't tell us the approximate height of the lumber you had stacked with stickers?

A. No, sir, I can't. We just estimated it. We didn't tally [123] it. We just estimated it, if there was enough in there to fill this order that we had an inquiry about.

Q. You drew a line at this point on this diagram. What was that line supposed to represent?

A. That was lumber.

Q. May we mark the north end of that X-6, the south end of it as X-7. How wide was that lumber?

A. That I couldn't tell you.

Q. Was that lumber stacked?

A. Part of it was, yes.

Q. Were stickers used to stack it?

(Testimony of Hyrum Jensen.)

A. That I can't remember.

Q. What was the approximate height of the stack in that area?

A. I can't remember that either. I never measured it at the time and I couldn't say.

Q. You stood alongside the stacks when you looked at them, did you? A. Yes, we did.

Q. Were they lower than your eye view or were they higher?

A. I just don't remember how that was.

Q. Now, what did this line which you drew here refer to?

A. That was the back end of the mill where the carriage would go after a board was sawed off the log and dumped onto the platform, and when we cleared the space here for this portable truck to come in, we piled a lot of lumber over on this platform [124] where the sawmill was.

Q. How big was that platform?

A. I never measured it. I don't know.

Q. Can you tell us the approximate size of that platform?

A. No, I could not because I may misguess.

Q. Was that platform destroyed in this fire?

A. Part of it was, yes.

Q. Was that platform the width of the bunker for the saw carriage? A. I believe it was.

Q. Was it wider than the width?

The Court: I think the witness should sit down.

The Witness: Thank you.

(Testimony of Hyrum Jensen.)

Q. (By Mr. Castro): Was it wider than the width? A. That I don't remember.

Q. Was it shorter than the width?

A. What do you mean "shorter"?

Q. Was it shorter than the width of the carriage bunker? A. No.

Q. Can you give us the approximate length of that platform? A. No, I could not.

Q. You can't estimate the length of that platform?

A. No, sir, I can't because I don't know where the carriage was sitting to the back.

Q. Wasn't the north end of that bunker the terminal end [125] of the track?

A. There was a track all the way along the mill, the track; it ran the full forty feet.

Q. And wasn't the north end of that bunker the terminal end?

A. What do you mean "terminal"?

Q. Where was the saw located?

A. The saw was located in the middle of the mill.

Q. What was located at the street-end of the mill?

A. That was where we put the log on a carriage to saw into lumber.

Q. What did you have to stop the carriage at the north end of the mill?

A. We had a carriage with a friction top. You would push it forward and your carriage would run, push the log through the saw, and you would

(Testimony of Hyrum Jensen.)

automatically stop it and return it back. There was a bumper on the end, which is right where, if this saw carriage got away from the sawyer, it would bump that for a safety device and wouldn't run off the track.

Q. Was this platform you are talking about north of that bunker?

A. No, it was beginning at the bunker south with the bunker.

Q. Was that platform on the bunker?

A. The platform, yes, was on the frame of the sawmill.

Q. Was it on the frame of the tracks of the sawmill?

A. Yes, it was setting there. We built the platform a [126] little wider than the sawmill, I believe.

Q. Then the platform was not south of the bunker, was it?

A. The platform was north—what do you mean by bunker? Let me get that straight.

Q. You used the term bunker in describing what you had at the end of the tracks.

A. It was a bumper. Let me explain here. The sawmill was sitting here, and the truck would run from one end of this to the other, and on this end of the sawmill there was a big 12 x 12 put across the end so if this sawyer at anytime didn't change the gear of the sawmill, it would hit that guard there and wouldn't run off the track. That was for safety devices.

(Testimony of Hyrum Jensen.)

Q. That is the bunker I have reference to.

Mr. Hilger: Are you using the word "bunker" or "bumper"?

The Witness: Bumper.

Q. (By Mr. Castro): I show you a photograph taken on August 10th, 1956. Does that show the carriage bunker?

A. No, it does not. The carriage must be setting back up to this end on the south end of the building.

Q. Does it show the platform on which the tracks were sitting?

A. It shows the platform down below where the offbear would stand to pull off the lumber about four feet or three feet lower.

Q. Does it show the bumper which you had at the north end [127] to stop the saw?

A. I think it does, yes.

Q. Will you point that out? Will you mark on the photograph?

(The witness did as requested.)

Mr. Castro: I will mark that X-1, and I would offer the photograph in evidence as Defendant's exhibit next in order.

The Court: This you said was August, 1956?

Mr. Castro: Yes, August 10th, 1956.

The Court: The previous picture you said was August, 1957?

Mr. Castro: I'm sorry.

The Court: You meant 1956?

(Testimony of Hyrum Jensen.)

Mr. Castro: 1956, your Honor. These were all taken at the same time.

(The picture referred to was thereupon received in evidence and marked Defendant's Exhibit D.)

The Witness: Could I answer that question, Mr. Castro, before the Court looks at that picture?

The Court: What is it you want to say?

The Witness: I would like to explain that the platform on the carriage that the lumber was piled on at that time, the whole thing would move backward and forward, and what he is getting at is the platform doesn't show, but it was on the carriage, and evidently the carriage had been pulled to the south end, and that also pulled the platform, whichever it was, [128] and the lumber was piled on both the platform, front and back.

The Court: What you are saying is the platform was movable?

A. Yes, it was movable.

Q. (By Mr. Hilger): And is it your testimony that that platform does not show in this picture?

A. Part of it shows. The width of the sawmill and the carriage does not show.

Q. (By Mr. Castro): Then this platform that you say moved the lumber from the west wall over was a movable platform?

A. Was it a movable platform?

Q. Yes. A. Yes, it was on the sawmill.

Q. What was the approximate size of that movable platform? A. I don't remember.

(Testimony of Hyrum Jensen.)

Q. Can you give us any approximation as to the size of that movable platform?

A. Yes, it would be, I would say, 20 x 10 feet.

Q. That would be 20 feet long, 10 feet wide?

A. That was the moving platform.

Q. What was the material in that moving platform?

A. I didn't understand the question.

Q. What was the material in that moving platform? A. It was lumber.

Q. Was that platform burned up in this fire?

A. Yes, it was.

Q. I show you Exhibit D. That shows the platform, does it not?

A. Could I explain this more thoroughly to you? You don't seem to understand.

Mr. Castro: I move to strike the answer as not responsive.

The Court: No. Just answer the question as best you can.

A. That is the lower platform where our off-bear stands to pull the lumber off the carriage.

Q. (By Mr. Castro): Will you mark that platform with an X, please?

(The witness did as requested.)

Mr. Castro: I will mark that X-2, your Honor.

Q. Was that composed of wood? A. Yes.

Q. Was that burned up in the fire?

A. It was charred, if I remember right. I didn't pay too much attention to it.

(Testimony of Hyrum Jensen.)

Q. Did you have any of this redwood stacked on that lower platform X-2?

A. I don't know what you mean by the lower.

Q. Did you have any of the redwood stacked on that lower platform at the time of this fire?

A. No.

Q. What is the difference in height between the lower platform and the movable platform?

A. I don't remember exactly what it was.

Q. Approximately? A. I don't remember it.

Q. You can't determine it from looking at that photograph? A. I can make a guess.

Q. Approximately?

A. Being familiar with a sawmill I would say it was about three feet, possibly a little bit more. They were built in different heights.

Q. How much redwood did you put up on top of the movable platform?

A. That I don't know. I didn't put it there myself. It was moved over to make room for the truck that came in, and I don't remember how much was on it. I know there was a considerable amount on both ends on the platform and where the carriage runs up in front.

Q. Who moved it over there?

A. That I couldn't tell you.

Q. Was it an employee of the Eureka Lumber Company? A. I don't know.

Q. When was it moved over there?

A. That I can't remember the exact date. [131]

(Testimony of Hyrum Jensen.)

Q. With relation to the fire, the day before, a week? A. It was before the fire.

Q. The fire occurred on a Monday.

A. I said——

Q. About how long before the fire was it moved over?

A. I would say a month or six weeks, probably longer.

Q. Then the redwood material remained on the movable platform for at least a month or six weeks before this fire?

A. As far as I remember, yes.

Q. And you saw it there on several occasions, did you? A. Yes, I did.

Q. Can you give us an estimate of the amount that remained on top of there from a month to six weeks? A. No, I could not.

Q. Now, that photograph also shows the diesel motor which you referred to, does it not?

A. Yes, and the sawmill.

Mr. Castro: May we show this photograph to the Jury at this time, your Honor?

The Court: Very well.

Q. (By Mr. Castro): Is there any place that you had redwood moldings stored?

A. I have shown you on the map.

Q. Would you again point out if there is any other position——

The Court: It is getting a little repetitious now.

[132] You can ask him if there is any place in

(Testimony of Hyrum Jensen.)

addition to what he has pointed out. I am not going to have him go over it again.

Q. (By Mr. Castro): Is there any place you have not marked on the map where you say you had redwood molding?

A. I don't remember. I can't remember all the piles that was in it offhanded.

Q. Isn't it a fact there had never been any redwood molding stored along the west wall?

A. I didn't hear the question.

Q. Isn't it a fact that you did not have any molding stored along the west wall?

A. There was molding stored, but that was the molding that we moved over on the other side and put on the sawmill.

Q. Isn't it a fact that you did not have any molding stored at or in the center of the shed?

A. No, we had molding stored.

Q. Isn't it a fact that the only molding that you had stored in there was stored against the east partition?

A. We had molding stored where each place I showed you on that map.

Q. Did you have any molding stored in this northwest room? A. No.

Q. Did you have any molding stored in this southwest room? A. There could have been.

Q. What is your best recollection as to whether you had [133] redwood molding stored in that southwest room?

(Testimony of Hyrum Jensen.)

A. I think we had redwood door casings stored in there.

Q. I am talking about the molding.

A. I don't remember whether there was any molding in there or not. There was a considerable pile of redwood lumber dry in there.

Q. Will you look at your examination under oath at page 112 to the end of page 113. Will you read to yourself those questions and answers.

A. This whole thing?

Q. Yes.

(The witness read the portion indicated.)

Q. Have you read those questions and answers, Mr. Jensen? A. Yes, sir.

Q. And that refers to a diagram, does it not?

A. It has been so long ago I can't remember that. It has been a year and a half about.

Q. On October 12, 1956, did I ask you these questions and did you give these answers:

Mr. Hilger: At this time I will object to the use of this for any impeaching purposes on the grounds that there is no showing that there is any contradictory statement made in the portion that counsel has referred to compared to his testimony here.

The Court: I am afraid I would have to look at it [134] to rule on that objection. Have you a copy?

Mr. Hilger: I have a copy here beginning at Page 112. The Court is being supplied by other counsel.

(Testimony of Hyrum Jensen.)

The Court: I can't make it out. The witness is talking about "this" and "that."

Mr. Hilger: The record or sworn statement is so ambiguous I could hardly think it could be used for any purpose of stating designations as to locations. All it says on pages 112 and 113 is that the molding was stored on the west side of the partition, which is what his testimony has been.

Mr. Castro: And it was noted on the diagram in front of him where he was pointing to, and the diagram is part of that record.

Mr. Hilger: On the west side.

The Court: It is not very clear to me. I will allow him to read the questions. That is all you can do on impeachment anyhow. Maybe the Jury can make more out of that than I can. I will overrule the objection.

(Mr. Castro read the portion of the record as follows:)

"Q. Where were those redwood moldings and casings kept? A. In the building.

"Q. What part of the building?

"A. On the west side of the building where [135] the sawmill was back in there, then some was in the inside where the door frames and window frames and plywood and mica boards and like that.

"Mr. Castro: Do you have a stapler here?

"Unidentified Speaker: Yes.

"Mr. Castro: Do you want to make that No. 4?

"Mr. Hilger: What is that?

"Mr. Castro: Just a rough floor diagram.

(Testimony of Hyrum Jensen.)

"Mr. Jensen, this is a rough floor diagram. The portion closest to you represents the Third Street portion, that's the bottom of it. The portion to the right represents the Commercial Street, the railroad tracks would be to the top, behind. Now, as I understand it, the portion on the left here which would be the easterly half of the building, was the ground section a dirt section?

"A. Uh, huh, west, the west.

"Q. The west half would be the dirt section and the east would be the floor or improved section?

"A. That's right. This would be the improved. This was a floor where the door casings were and this would be where the molding was and the sawmill sawing boards up in here, motor sits here, the [136] lift truck here and moldings was all along here up to here and all here, the sawmill was there.

"Q. Now with reference—you pointed to the area where there was molding, this redwood molding, 66,000 board feet of redwood molding and window casings. Now I'll write down as you point—

"A. (Int'g.) Here, here and here.

"Q. Now were you pointing on the dirt side or the improved side?

"A. Here, here and here. This had a partition between here and the dirt side with the floor, that's where our door frames and plywood and mica and stuff like that was and some paint and shingles and tar paper and stuff like that.

(Testimony of Hyrum Jensen.)

“Q. On both sides of that partition then was molding mostly on this side?

“A. On the west side.

“Q. Indicating on the—mostly on the west side. Now did you have molding, this redwood molding any place else? A. No.”

Q. Were those questions and answers asked you?

A. Yes, they were and those are correct.

Q. And did I write down on the diagram where you were pointing to at the time I asked you those questions? [137]

A. I don't know whether you did or not. I don't think I have ever seen this before.

Q. You deny that you saw that diagram before?

A. I am not denying. I don't remember it.

Q. Do you remember a diagram being shown to you at the time I asked you those questions?

A. No, I do not.

Q. Do you deny that a diagram was shown to you at the time I asked you those questions?

A. No, I do not. I don't remember it.

Mr. Castro: At this time I ask that that diagram be marked with the original statement, your Honor, for identification.

The Court: It may be marked for identification.

The Witness: I would like to explain further.

The Court: Don't volunteer anything.

The Witness: I am sorry.

The Court: Just answer the questions.

(The diagram referred to was thereupon

(Testimony of Hyrum Jensen.)

marked Defendant's Exhibit E for identification.)

Q. (By Mr. Castro): You have referred to two electric motors being damaged in the fire. Where were they located at the time of the fire?

A. They were sitting on the north side of the building on top of some molding. [138]

Q. Whereabouts on the north side were they sitting?

A. I would say somewhere in this category.

Q. Would you put a mark down where you would recall them sitting?

A. I don't remember. It was in the north end.

Q. Can't you indicate on the diagram approximately where they were sitting?

A. Yes, I can. It would be in this—from here into there like. We set them on top of some molding.

Q. You are drawing a line commencing at a point that I asked to be marked X-8, running across to a point that I asked to be marked X-9. Is this the line that you drew in there?

A. Yes.

Q. How big were those electric motors?

A. I don't remember exactly. I think one was a 75 and the other was a 50. I am not sure about that. I don't remember. They were large motors. They were built to operate a large planer.

Q. And were they sitting on top of the redwood molding?

A. On some that was piled there, they were.

(Testimony of Hyrum Jensen.)

Q. How high were the stacks on which these two motors were sitting?

A. I can't remember how high they were.

Q. Can you tell us approximately?

A. No, I can't. [139]

Q. Can you tell us whether it was approximately waist level, shoulder or higher?

A. I don't remember, sir.

Q. Isn't it a fact that those motors were sitting on the ground?

A. They were after the fire, yes.

Q. And they were sitting in an upright position?

A. That I don't know. I know we had an electrician look at them.

Q. I ask you to look at Exhibit D. Do you see those two motors, Exhibit D?

A. No, I do not. They are not on there.

Q. Is this a motor? Do you recognize that as a motor?

A. I can't see good enough to tell you whether it is a motor or not.

Q. And do you see a light object a few feet from it? A. I can't say.

Q. Do those appear to be the motors which you had in the northeast corner of the building?

A. They were in the north corner.

Q. Were they in that northeast corner?

A. That I don't remember. They were in that area where we marked a cross there.

(Testimony of Hyrum Jensen.)

Q. You do not know whether this photograph shows those two or not? [140]

A. I do not. I can't see it. I think Mr. Hilger could enlighten me on that.

Q. Approximately how long had you had the 66,000 board feet of molding in the shed before the fire?

A. Well, I don't remember exactly, but some of it had been there for probably over two years.

Q. Would it have been there a month or six weeks before the fire? A. Yes.

Q. Would 66,000 board feet have been there longer than a month before the fire?

A. Not all of it, no.

Q. Say the month of June. Did you add any molding to the shed?

A. We added molding that we took out of the shed when we ran the truck in there, and after the sawmill or the truck was taken out, we brought some molding back from the outside yard and put in there.

Q. Was that additional molding to that which you had in the shed?

A. It was in the shed before we took it out. We rented the space for this man to build a portable sawmill.

Q. Did you add any new redwood molding during the month of June before this fire?

A. That I don't remember. [141]

Q. You have no recollection on the subject?

A. Not to be sure.

(Testimony of Hyrum Jensen.)

Q. What is your best recollection as to whether you did? A. I am not sure.

Q. Then the 66,000 board feet had been there at least a month before the fire?

A. I can't remember whether all of it was there or not. We was adding practically all the time.

Q. The 35,000 board feet of fence board, approximately how long had it been in the shed?

A. Some of it had been there quite awhile and some had been put in recently. Just when I can't remember.

Q. Was any put in during the month of June before the fire? A. That I can't remember.

Q. What is your best recollection?

A. I just don't remember.

Q. Would it have been there at least a month before the fire? A. I can't remember.

Q. Could it have been there at least a week before the fire? A. I can't remember.

Q. What was the cost of the fence boards, the wholesale cost?

A. That I don't remember. They were different prices.

Q. Those fence boards that you bought were rejects, weren't [142] they?

A. Some of them were and some of them were not. That was the way we conducted our business. We would buy a lower grade of lumber that had a ragged edge and so on, and we would trim it off and raise the grade up to a No. 1 board.

(Testimony of Hyrum Jensen.)

Q. How much did you have of reject lumber in that 35,000 board feet?

A. There was none.

Q. How much did you pay for reject fence board lumber?

Mr. Hilger: I will object to that as having no bearing on the value of the manufactured product. He has testified the value at the time of the fire, and that is the only material point here. What he paid for his raw material——

Mr. Castro: It is a question whether it has been remanufactured, your Honor. That is why I am asking the particular question.

The Court: That at least would be material. It is quite remote, Mr. Castro. I don't quite see the materiality.

Mr. Castro: Reject lumber has one value.

The Court: I understand that.

Mr. Castro: Remanufactured lumber has another value. There will be evidence as to the condition of the material, whether it was reject or remanufactured.

The Court: If you will present evidence and lay the foundation for it it may be material. [143]

Mr. Castro: That is what I am doing.

The Court: You might ask him what a typewriter cost. It has no relationship to the claim.

Mr. Castro: I am laying the foundation for the testimony which is going to be offered in that regard.

The Court: To save time I will allow it.

(Testimony of Hyrum Jensen.)

The Court: Do you know what you paid for the reject lumber before you remanufactured it?

A. Yes, we paid all the way from \$20 and some as high as \$50.

Q. A what?

A. A thousand. May I explain the thousand feet was figured on the basis of a half inch, and therefore a thousand feet of half inch would tally twice as much as that height would if it would be a full inch. That is why it didn't take up but very little space.

Q. (By Mr. Castro): I am going to ask you to look at your examination under oath at page 115 commencing at line 8 to line 12. I believe that covers the subject there. Have you read those questions and answers? A. Yes, I did.

Q. At the time of the examination under oath did I ask you these questions and did you give these answers:

"Q. Now, how did you determine the price at \$85 a thousand?

"A. That's what we sold them for. [144]

"Q. How much did they cost you?

"A. I don't remember."

Did you give those answers to those questions?

A. I don't remember exactly.

The Court: He just asked you if you gave those answers.

The Witness: Yes, I gave those answers.

The Court: I will sustain the objection on the

(Testimony of Hyrum Jensen.)

ground that it is not proper cross-examination. I do not see anything conflicting in the statement.

Mr. Castro: He said the price was \$20 to \$50.

The Court: That is what he said. He said he didn't remember at the time of the examination, and he has testified now. There is no conflict.

Mr. Hilger: Besides, what is the cost of a manufactured item——

The Court: I will sustain the objection.

Q. (By Mr. Castro): Did you refresh your memory concerning the cost of any of the fence boards that you bought?

A. Repeat, please.

Q. Did you refresh your memory concerning the cost of any of the fence boards that you bought?

A. Well, not now I didn't, no.

Q. In your proof of loss you have listed certain pine moldings and door casings. Where were they kept? [145]

A. The molding and door casing?

Q. Pine molding and door casing?

A. May I show you on the map?

Q. If you please. Mark it.

A. This is our store building here, and we had a storehouse where we kept doors, windows and high-priced molding which was of a pine variety, which costs more than redwood or any other kind. There was molding in there, door cases, and a general line of building material, and so on.

Mr. Castro: May we mark that room "North-east room," your Honor.

(Testimony of Hyrum Jensen.)

Q. How was the pine molding stored in there?
Was it stacked?

A. No, it was done up in bundles. It ran from 10 to 20 feet long, and it was wrapped in, I think, 50 in a bundle.

Q. Was it laid on the floor?

A. Yes, it was.

Q. Was that molding burned in the fire?

A. No, it was not.

Q. Was that molding damaged in the fire?

A. It was damaged, yes.

Q. Could you describe the amount of damage to that molding?

A. No, I could not. It was black and wet.

Q. Could that molding have been salvaged?

A. Some of it I think could have been. [146]

Q. Approximately how much?

A. I don't know. I didn't look at it.

Q. Approximately how much molding did you have in that room?

A. That I can't remember. It was on a special order.

Q. You bought it specially?

A. Yes, we had.

Q. How much had you bought specially?

A. I beg your pardon?

Q. How much had you bought specially?

A. I don't remember how much it was. I hadn't looked at the invoices.

Q. Approximately how long before the fire would you say you bought that specially?

(Testimony of Hyrum Jensen.)

A. That I can't remember exact.

Q. What had you paid for it?

A. I never looked at an invoice. That was my son's job.

Q. I will show you a photograph taken on August 10th, 1956. Do you recognize the contents of that photograph? A. Yes, I do.

Q. Is that a photograph of that northeast room?

A. Yes, sir.

Q. Is that the condition as it was following the fire? A. That I couldn't say.

Q. Does that show any of this molding that you have referred to? [147]

A. No, it does not. It is back of the windows and plywood that is laying there, back over in this part.

Q. Would you indicate with your pen where you say that pine molding was?

A. I can see a small end of it right here.

Mr. Castro: I will mark that X-1. We will offer that photograph in evidence as Defendant's exhibit next in order.

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit F.)

Q. (By Mr. Castro): What is that material which is tied up with string on the left-hand side of that photograph?

A. That is ready-made door casings and window casings.

Q. That was tied with string, and what was it?

(Testimony of Hyrum Jensen.)

A. I think that was tied with wire, if I remember right. I am not sure.

Q. On the right-hand side of the picture there are stacks of doors? A. Yes.

Q. And at the back of the picture it is a photograph or a picture of some type?

A. No, that was a medicine cabinet, mirror.

Mr. Castro: May I show this to the Jury at this time, your Honor?

(Defendants' Exhibit F was passed to the Jury.) [148]

Q. (By Mr. Castro): After the fire were any of those doors sold? A. Yes.

Q. To whom were they sold?

A. Rice Supply.

Q. How many of those doors did you sell to the Rice Supply?

A. Twelve, I believe. They were not sold. He borrowed them.

Q. Rice Supply Company was one of your creditors, was it not? A. Yes, sir.

Q. And you owed them approximately \$1,300 at the time of this fire, did you not?

A. That I don't remember.

Q. You were indebted to them at the time of this fire, weren't you? A. Yes, sir, we were.

Q. Those twelve doors were turned in to Rice Supply Company?

A. They were. He just borrowed them. They were not credited or anything. They never have been.

(Testimony of Hyrum Jensen.)

Q. Have they returned them to you?

A. No, sir.

Q. Did they also pick up twelve doorjambs or door frames? A. Not that I know of.

Q. Did you sell any of those doors to anybody else? [149] A. Not that I remember of.

Q. Did you send in an order of doors to McKinleyville? A. No.

Q. Are you acquainted with a man by the name of Don Wilson? A. That I don't remember.

Q. Did you have an employee by the name of Don Wilson? A. Yes.

Q. Was he employed by you after the fire?

A. I can't remember whether he was or not. I believe he was for a few days.

Q. Was he employed by you before the fire?

A. Yes.

Q. Did you send him to McKinleyville with doors, toilets and plywood?

A. I don't remember. I had a stack of door supplies that was out to my house. I have a large garage out there, and I have a good stack of building material out there. He may have taken some doors out from that stock. I am not sure.

Q. Did he take any doors out of the stock which is shown in the photograph? A. Did I what?

Q. Did he take any doors out of the stock which is shown in the photograph?

A. Not that I remember. If he did he was not instructed to.

Q. At the time of the fire or the day of the fire

(Testimony of Hyrum Jensen.)

was any [150] material, merchandise, removed from the building? A. I believe there was.

Q. Did you remove it? A. No.

Q. Was it placed on your pickup truck?

A. No, not that I know of, unless somebody else did, I didn't do it.

Q. What material or merchandise did you see being removed on the day of the fire?

A. I don't know. I didn't see any of it moved. I heard there was some moved over to Lewis H. Hess & Company across the street that somebody had tried to save.

Q. You had a pickup truck, Eureka Lumber Company had a pickup truck, didn't it, on the day of the fire?

A. We had a pickup truck, yes.

Q. And Harold Dee Jensen was using it on the day of the fire, wasn't he?

A. That I don't know.

Q. Did you see him use it on the day of the fire? A. I am not sure.

Q. Was the merchandise which was taken out after the fire placed on that pickup truck?

A. I don't know. I never seen any.

Q. Did you have a foreman at the Eureka Lumber Company? A. Yes. [151]

Q. What was his name?

A. At the time of the fire we didn't have a foreman. We had one prior to the fire, about a month before.

Q. What was his name?

(Testimony of Hyrum Jensen.)

A. John Roberts, I believe, probably two months before the fire.

Q. You did not have a foreman for two months before the fire?

A. No, I don't believe we did. Mr. Jensen, Andrew Jensen, sometimes if I would leave, he would probably act as manufacturing the lumber, to see it was run through the saw properly and so on, lathe or whatever we were cutting, fence, molding.

Q. Was Andrew Jensen working as a foreman for two months before the fire?

A. I don't believe he was.

Q. Was Andrew Jensen working for you during the month of June, 1956, the month of the fire?

A. I can't remember the dates that he was working for us. He did work for us, however. He worked for us a couple of years ago and later he came back, but I don't recall now.

Q. Following the fire did you contact Mr. John Roberts? A. No, sir.

Q. Did Mr. John Roberts make his home in the City of Eureka at the time of the fire?

A. I don't think he does. [152]

Q. On the afternoon following the fire did you telephone Mr. John Roberts?

A. No, sir, I did not.

Q. Did you ask Mr. Roberts to come down to the Eureka Lumber Company, that you wanted to talk to him?

Mr. Hilger: I will object to what he might have

(Testimony of Hyrum Jensen.)

asked in a conversation he has already denied took place.

The Court: You will have to lay the foundation for it in some way.

Mr. Castro: That is what I am trying to do.

Mr. Hilger: He has denied the existence of the conversation, and to ask what he might have said at that conversation is improper.

The Court: I think counsel may have the right, if he wants to produce—I do not know what the materiality of it is, but if he wanted to produce a witness by the name of Roberts to state something to the contrary to what this witness said, it may be proper for him to lay the foundation. I will allow the question. I don't think you had finished.

Mr. Castro: May we have the question read?

(Question read.)

Q. (By Mr. Castro): ——to Mr. Roberts the afternoon following the fire?

A. No, sir, I did not.

Q. The afternoon following the fire did Mr. John Roberts [153] and his wife meet you at the Eureka Lumber Company?

A. I believe they came down. I owed him some money for wages when he was working before, that he said he didn't need, and for me to keep it until he needed it.

Q. How much did you owe Mr. John Roberts?

A. I don't remember exactly.

Q. But you do recall you talked to him about

(Testimony of Hyrum Jensen.)

the wages you owed him on the afternoon following the fire?

A. I don't remember what day it was. I think he came down to tell us how sorry he was a few days after. I don't know how long it was.

Q. On the afternoon following the fire did you ask Mr. Roberts if he could give you an estimate as to how much lumber was in that shed portion of your building?

A. No, sir, I did not, at no time.

The Court: I think we will take the morning recess at this time.

(Recess.)

Q. (By Mr. Castro): Mr. Jensen, in the proof of loss you attached a five-page statement referring to certain merchandise. Do you recall that?

A. Yes.

Q. At page 2 you have a heading called "Plumbing." A. Yes.

Q. And then a series of items running through that page [154] over to page 3, down to the item 6, half-inch 45 degree L's. A. Yes.

Q. Where were those items kept on the premises?

A. They were kept in a bin in the storehouse.

Q. Which room is the storehouse?

A. This was the store.

Q. Where was the bin located?

A. Over on this side where we kept the nails, pipe fittings and so on.

(Testimony of Hyrum Jensen.)

Q. That would be along the east side of the storeroom? A. Yes, sir.

Q. Were those metal parts that are listed there under plumbing damaged in this fire?

A. Not so much.

Q. Did you check to see whether any of those metal parts, such as piping and things of that nature, were usable after the fire or salable?

A. I think they could have been used.

Q. Then those items were not totally lost as they are represented to be in the proof of loss?

Mr. Hilger: I object to that. They are not represented to be totally lost. It says "Items partially destroyed or damaged by fire." The document speaks for itself.

The Court: I will sustain the objection. The question is argumentative. [155]

Q. (By Mr. Castro): With reference to the object called a planer that you referred to in the proof of loss at page 5, I believe——

A. We never listed any planer.

Q. Sets of planer heads. A. Yes.

Q. And planer knives? A. Yes.

Q. Where were they kept?

A. They were somewhere in the storeroom.

Q. Would you indicate where in the storeroom they were kept?

A. That would be impossible for me to tell, because I didn't go in there often enough. I believe I could give you an idea about where they were kept. I think they were right back of the office

(Testimony of Hyrum Jensen.)

here, right in a little cove we had in there, a cupboard with a couple of shelves. It was on top.

Q. Were those planer heads or knives damaged in the fire? A. I think they were, yes.

Q. Are they metal parts?

A. Yes, they were metal.

Q. What was the damage to them?

A. That I don't know.

Q. Did you inspect them after the fire?

A. No, I did not.

Q. Did you see them after the fire? [156]

A. That I can't remember.

Q. I will show you a photograph taken also on August 10th, 1956. Does that show the office section? A. Yes, it does.

Q. Does that show the shelving area that you have referred to along the west wall of the office?

A. No, it does not.

Q. Does it show a paint mixer?

A. Yes, it does.

Q. Where were the planer knives and heads with reference to that paint mixer?

A. I think they were in between this paint mixer and back up in this far corner. I am not sure where they were, but I have a slight recollection that they were in there.

Mr. Castro: May we offer this photograph in evidence as Defendant's exhibit next in order.

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit G.)

(Testimony of Hyrum Jensen.)

Q. Was that paint mixer damaged in this fire?

A. I never examined it too closely. I know it was all wet with water. I would say it was damaged.

Q. Was it repairable?

A. That I don't know.

Mr. Castro: May we show that photograph to the Jury?

The Court: While the Jury is looking at that [157] picture we will interrupt the proceedings and take the report of the Grand Jury.

(After the report of the Grand Jury the trial continued:)

Q. Did you have any planer in the building at the time of the fire? A. No.

Q. Do you know when you had obtained the planer head and knives? A. Not exactly.

Q. Do you know from whom you obtained the planer head and knives?

A. No, I do not.

Q. Can you state approximately when?

A. I would make a guess. A month or so before.

Q. And you can't identify the seller?

A. No, I can't.

Q. Was it Hill & Norton?

A. That we were selling to?

Q. That you were buying the knives and heads from? A. No.

Q. Did Hill & Norton, Incorporated, sell you a planer? A. Yes.

Q. Where was it at the time of the fire?

(Testimony of Hyrum Jensen.)

A. Out in the east yard. [158]

Q. Were the knives and heads part of that equipment? A. No.

Q. Now, the two electrical motors that you have referred to, from whom did you obtain their possession?

A. I think they came from Hill & Norton.

Q. Did you have those motors up for sale?

A. Yes, we did.

Q. Do you know what the asking price for them was? A. No, I don't, not exactly.

Q. Isn't it a fact that Hill & Norton had not sold those materials to you at the time of this fire?

A. They had sold them to us. We were going to trade them lumber for the planer.

Q. Did you notify Hill & Norton of the fire and the damage to those two motors?

A. They were there the next day, Mr. Hill—Bert Gilbert. I beg your pardon.

Q. Is there some name you wish to change?

A. Bert Gilbert.

Q. Was Mr. Gilbert a representative of Hill & Norton, Inc.? A. He did represent them, yes.

Q. Did Mr. Gilbert tell you that Hill & Norton, Inc., were going to present a claim to their own insurance carrier for the damage to those two motors?

A. They didn't tell me, no. [159]

Q. Do you know whether or not Hill & Norton, Inc., did present a claim? A. I do not.

Mr. Hilger: I object to that as immaterial, incompetent and irrelevant as to any issue raised in this proceeding. He had no control over what Hill

(Testimony of Hyrum Jensen.)

& Norton did. He testified he has no information on it.

Mr. Castro: Paragraph 8 of the building endorsement, your Honor, has the express provision.

The Court: Paragraph 8?

Mr. Castro: Paragraph 8 of the building endorsement has an express provision on it.

The Court: In respect of that, the witness says he has no knowledge of it. Doesn't that dispose of it?

Q. (By Mr. Castro): Don't you know that Hill & Norton have been paid in full by their own insurance carrier for those two motors?

A. No, sir, I never heard tell of it. They were our motors.

Q. With reference to the plywood you are claiming, you were buying reject plywood, weren't you?

A. Reject, yes, interior and exterior.

Q. How much of the reject plywood was involved in this fire?

A. The last I remember there was something like 3500 feet, [160] if I remember right.

Q. Of reject in the fire?

A. That was plywood.

Q. Plywood reject?

A. I don't know whether it was all rejects. I doubt it very much. It would be different types.

Q. Approximately how much of it was——

A. That I couldn't say.

Q. With reference to the sawmill, when did you acquire the sawmill?

(Testimony of Hyrum Jensen.)

A. We built it right there in the yard, in the building.

Q. When did you start the building?

A. Probably a year before the fire.

Q. Where did you get the diesel motor?

A. I think from J. & W.

Q. J. & W. who?

A. Lumber Company.

Q. What did you pay for that motor?

A. That I don't know.

Mr. Hilger: I object to that as incompetent, irrelevant and immaterial. The sawmill has been sold, and the sale price is the only value to be considered in this proceeding under the terms of the policy. Inventory sold but not delivered shall be valued at the sale price thereof, and likewise, even without that provision, what he paid for an [161] individual component would have nothing to do with the value.

The Court: We might be here for a long time if the insurance company was going to conduct an examination as to what he paid for every part of a completed piece of equipment. Do you intend to go into that?

Mr. Castro: I am talking about a large motor, your Honor, which is a main component of this sawmill.

Mr. Hilger: Under the terms of the policy it is immaterial. The evidence is the thing has been sold but remained undelivered, and the policy specifically provides as to inventory sold but not deliv-

(Testimony of Hyrum Jensen.)

ered; the only measure of value is the sale price thereof.

The Court: I am inclined to think your opponent is right about that Mr. Castro. Of course, you have a perfect right to cross-examine as to the facts concerning the value of the sawmill and the facts as to whether or not it was sold, how much and to whom and circumstances like that, but I think the inquiry you now pursue is immaterial. I will sustain the objection.

Q. (By Mr. Castro): Where did you acquire the carriage for the sawmill? A. The carriage?

Q. Yes.

A. That I don't know. I think that was from J. & W. also.

Q. Where did you acquire the feed works for the sawmill? [162]

A. That I don't know.

Q. On the transaction that you have described with Dayton Murray Truck Company, didn't you execute a written contract with the finance company of the General Motors Acceptance Corporation?

A. Did I furnish——

Q. Did you execute or sign a contract with that finance company? A. Yes.

Q. And all the credit which was given on that sawmill was \$4,000, wasn't it?

Mr. Hilger: I object to that. The document would be the best evidence of what it shows.

The Court: Sustained.

(Testimony of Hyrum Jensen.)

Q. (By Mr. Castro): Did you personally negotiate with Dayton Murray Truck Company for the purchase of the truck? A. No, sir.

Q. Or for the trade of the sawmill?

A. No, sir.

Q. After the fire did you make any determination whether the sawmill was repairable?

A. We decided it was not repairable.

Q. Did you make a check to see if it was repairable?

A. I think the Dayton Murray representative came over immediately afterwards. [163]

Q. Did you make any check to see whether it was—— A. Yes, I looked at it.

Q. Did you reach any conclusion as to whether it was repairable?

A. I would say it was not repairable.

Q. There was some salvage in the sawmill, wasn't there?

A. I don't think there would be any. The heat had warped all the cast iron and steel that was in the sawmill.

Q. Was there any salvage in the motor block?

A. That I don't know.

Q. Weren't you advised that there was salvage in the motor block?

A. No, I was advised that there was not, as far as that goes.

Q. Didn't Bud Hall advise you that there was salvage?

A. I don't think he ever did. I am not too

(Testimony of Hyrum Jensen.)

familiar with details. There could be salvage in it. I don't know. But for me looking at it there is no salvage in it.

Q. Will you look at your examination under oath at page 110, commencing at line 4.

The Court: How is that material to the case?

Mr. Castro: The cost of repair is an offset in the value of the article.

The Court: Isn't that something for the insurance company to take care of? [164]

Mr. Castro: No, the insurance company does not under the policy take the salvage.

Mr. Hilger: Under the terms of this particular policy salvage is, I submit, absolutely immaterial as to an item that has been sold but remained undelivered. The policy specifically says the loss will be the sale price of \$7500 in this particular instance. Salvage, I submit, is immaterial as to this particular item.

The Court: That was what I was wondering about. I do not see what materiality salvage has.

Mr. Castro: If a man sells an article for X dollars and there is a fire, and after the fire it is X dollars minus a hundred, their damage is only that difference, is it not, your Honor?

The Court: The value of the property at the time I think would be the test, but I do not know what you mean when you talk about salvage. That is a different matter, isn't it?

Mr. Castro: When you have an automobile accident, your Honor, you will take it to have it re-

(Testimony of Hyrum Jensen.)

paired. You determine whether it is worth having repaired or whether you will take the amount that is paid for the car in its then condition, and its then condition would represent the salvage.

The Court: The man who takes the insurance out, who insures for the value of the thing, it is its value after [165] it is damaged that counts, isn't it?

Mr. Castro: Yes, and that is what salvage enters into it.

The Court: I do not see the pertinency of your questions here, whether somebody told him there was some salvage in it.

Mr. Castro: Number 1, he has denied there was any salvage in it, and then I asked him the specific question if a man did not so advise him.

The Court: That would be all hearsay.

Mr. Castro: It is not hearsay as to this man. He was present at the time of the conversation.

The Court: It is hearsay as far as the issue is concerned. The fact that someone may or may not have told him whether there was some salvage in it would be immaterial. The question is still what is the value of it.

Mr. Hilger: This man has already testified to his conclusion that it had no salvage.

The Court: I do not see the pertinency of the cross examination.

Mr. Castro: I will withdraw that.

Q. Was that a Cummings diesel motor?

A. Yes, it was.

Q. Did you have the Cummings diesel motor

(Testimony of Hyrum Jensen.)

people come and examine that engine after the fire?

A. No.

Q. Did the Cummings diesel motor people come and examine that engine after the fire?

A. No, not that I know of.

Q. Did Bud Hall of the Cummings Diesel Company come and examine that motor after the fire?

Mr. Hilger: It assumes a fact not in evidence. There has been nothing here to identify Bud Hall.

Q. (By Mr. Castro): Did you have any mechanic examine that engine after the fire?

A. Not to my knowledge.

Q. Did you have Bud Hall examine that engine after the fire? A. No, I did not.

Q. Will you look at your examination under oath at page 110, lines 4 to 17. Read those questions and answers, please.

(The witness perused the transcript referred to.)

Q. Have you read those questions and answers?

A. Yes.

Q. On October 12, 1956, did I ask you in the examination the following questions:

“Q. You haven’t checked it over to determine whether or not it’s repairable?

“A. But your insurance men have.

“Q. I’m asking whether you did. [167]

“A. No.

“Q. Or did you have anybody check it over?

“A. Yes.

“Q. Who did you have check it over?

(Testimony of Hyrum Jensen.)

"A. Oh, a couple of mechanics.

"Q. Who are they?

"A. Bud Hall for one.

"Q. Anybody else?

"A. I think some Cummings engineer checked it over. I think one of them said there was a little salvage in the block of the motor.

"Q. Who was the Cummings engineer?

"A. I don't know who he was."

Q. Were those questions asked and those answers given? A. I will explain.

Q. First, were those questions asked you and did you give those answers?

A. I would like to tell you how that happened, first.

The Court: He wants to know——

The Witness: I would say that is correct.

Q. (By Mr. Castro): Now, after that examination under oath this document was submitted to you which is Exhibit E, was it not?

A. I don't know.

Q. Turning to page 158 of that document, does that page [168] bear your signature?

A. Yes, it does.

Q. Where did you sign that document?

The Court: This is wasteful and time-consuming. You have already established the fact that he gave certain answers to certain questions. What is the next question?

Q. (By Mr. Castro): And you executed this document——

(Testimony of Hyrum Jensen.)

The Court: Counsel, he has answered the question. You don't have to go into that any further. He said he did.

Mr. Hilger: We will stipulate.

Q. (By Mr. Castro): Yesterday you identified certain financial statements. You had given those statements to the Crocker Anglo Bank.

A. My son had, yes.

Q. Did you authorize your son to give them to the bank? A. Yes, sir.

Q. Who prepared those financial statements?

A. Our bookkeeper.

Q. Who was your bookkeeper?

A. Ellen Van Harpen was. I think she was the bookkeeper at that time, yes.

Q. Referring to Plaintiff's Exhibit No. 17, the financial statement at the close of business in December, 1954, who prepared that one?

A. I imagine my son and one of our bookkeepers. I believe [169] we had Mrs. Thrasher at that time.

Q. I will show you Exhibit 18, which is the financial statement as of the end of business on May 31st 1956. Who prepared that one?

A. I think that must have been my son and Mrs. Van Harpen.

Q. Referring to Exhibit 18, that is a false document, is it not?

A. I would like to have you explain to me which is 18.

Q. That is the one which is numbered 18, the one as of June 1, 1956.

(Testimony of Hyrum Jensen.)

A. I would say it was not a false document.

Q. You went through it thoroughly before you signed it?

A. I hired my son for that, and he was well capable of it, and anything he asked me to sign I would sign it.

Q. And you read it over before you signed it?

A. No, I never did read it over.

Q. Did you read it over before you testified in this Courtroom yesterday that all the facts therein were true except a piece of property at fresh water?

A. I have always taken my son's word for it, and everything he told me I found to be true.

Mr. Castro: I move to strike that as not responsive to the question.

The Court: He asked you whether you read it over.

A. No. [170]

Q. (By Mr. Castro): Did you personally own the property which is listed as being at Ogden, Utah?

A. No. My wife did.

Q. As of June 1—

Mr. Hilger: What was that answer?

The Court: He said his wife did.

Q. (By Mr. Castro): Did you have any record title in that property?

A. I have never had any record title in it.

Q. That has been your wife's separate property during your entire marriage life, has it not?

A. Yes.

Q. Under "mortgages on real estate" you have

(Testimony of Hyrum Jensen.)

listed the amount of money that you owed Mr. Abrahamsen as of June, 1956?

A. If it is on there I had.

Q. It does not appear to be on there.

A. In what month?

Q. The month for which that is given, June 1, 1956.

A. I don't believe I owed him any money at that time.

Q. Didn't you owe Mr. G. Abrahamsen a sum in excess of \$13,000 on a second deed of trust in June, the first of June, 1956?

Mr. Hilger: To shorten this, there is a deed of trust in the amount of \$19,600 as shown on this balance sheet that is payable to Alfred Leen. [171] That might help to move things along.

The Court: If that is the same item——

Mr. Hilger: I believe it to be.

Q. (By Mr. Castro): Did you execute a note to Mr. Leen? A. No, sir.

Q. Did you execute a deed of trust to Mr. Leen?

A. No, I don't think I did.

Q. You executed a note to Mr. Abrahamsen, didn't you?

Mr. Hilger: I will object to that. If there is a note and deed of trust, the contents of which are being discussed, I think the notes and deed of trust would be the best evidence of what they contain. All sorts of confusion could grow out of something like this.

(Testimony of Hyrum Jensen.)

Mr. Castro: There is no confusion. It is in black and white.

Mr. Hilger: Then I will renew my objection that as to any document referred to the document itself is the best evidence.

The Court: I will sustain the objection. I am not going to spend a lot of time on something that may make for confusion if there are documents that show exactly what happened.

Q. (By Mr. Castro): Under Schedule 1, referring to insurance, you represented to the bank that you had \$155,000 worth of fire insurance on the building. Do you see that?

A. I never prepared this. I don't know whether that is [172] true or false.

Q. That is what that statement contains, is it not?

A. I would like to ask my counsel, Mr. Hilger, if that is correct.

The Court: You do not know?

A. I don't know.

Q. (By Mr. Castro): Did you have \$155,000 fire insurance on any buildings on June 1, 1956?

A. I don't know.

Mr. Hilger: There is nothing on there that restricts it to one building. There are several buildings.

Q. (By Mr. Castro): Did you have several buildings which would have total fire insurance of \$155,000 as of June?

A. I don't know. I never kept track of it.

(Testimony of Hyrum Jensen.)

Q. This profit and loss statement asks you to set forth the amount of merchandise which you had as of June 1, 1956, did it not?

The Court: That calls for something that is in the document, doesn't it?

Mr. Castro: I am refreshing his memory and asking a question about it.

The Court: I am doubtful as to the materiality. What has this got to do with how much money the insurance company owes on the fire?

Mr. Castro: Right now he is asking for 101,000 [173] board feet of lumber which is involved in that particular statement, your Honor.

The Court: Yes, but you asked him about some profit and loss statement and mortgages.

Mr. Hilger: We will stipulate that as of June 1, 1956, this Acceptance sheet showed \$28,000 in inventory in the building.

Q. (By Mr. Castro): What part of that inventory was in inventory which was being processed?

A. That was in the building.

Q. And you had \$9,000 in round figures of being processed in the building June 1, 1956?

A. That I don't know. I know we did a lot of remolding stock and everything in the building.

Q. Did you have \$18,280 of finished merchandise as of June 1, 1956?

A. We had a lot of stock in there and these figures show that we must have had it.

Q. And those are figures that were put there by your son Harold Dee?

(Testimony of Hyrum Jensen.)

A. Harold Dee and our bookkeeper. I think our bookkeeper put those figures there.

Q. Do you know whether or not your bookkeeper put those figures there?

A. No, sir, I do not. [174]

Q. How much merchandise did you buy after June 1 up to the time of the fire, June 25th?

A. I don't know.

Q. Approximately? A. I don't know.

Q. Did you buy any merchandise after you gave that financial statement up to the time of the fire?

A. I don't know.

Mr. Castro: Counsel, do you have a copy of his 1955 tax return?

Mr. Hilger: I have only a copy that is unsigned, unexecuted, of his State return.

Q. (By Mr. Castro): With reference to that financial [175] statement, Exhibit 18, didn't you have notes payable of more than \$5,000 at the time you gave this financial statement on June 1, 1956?

A. To whom?

Q. To anybody.

A. I might have. I owed money.

Q. The financial statement states that you owed a note to the bank for \$5,000.

A. That was business money, yes.

Q. Did you owe other notes?

A. I may have.

Q. Under the paragraph of "Other notes payable" it was [175] left blank. How much did you owe on other notes? A. I don't know.

(Testimony of Hyrum Jensen.)

Q. How much did you owe in accounts payable as of June 1, 1956? A. That we owed?

Q. Yes. A. I don't know.

Q. Exhibit 8 says "Accounts Payable past due \$3,500." A. That is probably what it was.

Q. Didn't you owe substantially more than \$3,500?

A. That I couldn't tell you. I didn't keep the books. I never did. My son was hired to do that and that was his job. And I could say every time we furnished a financial statement the bank sent a man down to look it over, and they always okayed it.

Mr. Castro: I move to strike that as not responsive to the question.

The Court: What was the question?

Mr. Castro: I asked him if he owed substantially in excess of \$3,500 on accounts payable as of the date he gave this statement.

The Court: That is only partly responsive.

A. I don't know.

The Court: I will allow it to stand. You can ask him some more questions. [176]

Q. (By Mr. Castro): Did your accounts payable increase between June 1 and the date of the fire on the 25th? A. Did what?

Q. Did your accounts payable increase between June 1 up to the time of the fire?

A. I don't know.

Q. Did they decrease?

A. I don't know. I never kept the books at any time.

(Testimony of Hyrum Jensen.)

Q. Wasn't your bank account closed out between June 1 and June 25?

A. The bank account was closed out on the 22nd of June.

Q. Was that closed out by an attachment?

A. Yes, it was.

Q. How much was the attachment?

A. That I don't remember.

Q. Did you reopen that bank account after June 21 up to the time of the fire? A. No.

Q. As of the first of 1956 did you take an inventory of your merchandise and stock in this building? A. I imagine they did.

Q. Is the closing inventory figure given in Exhibit 18, \$15,478.11, the inventory as it was actually taken?

A. The bookkeeper and our son okayed it and put it there; I would say yes. [177]

Q. To your knowledge was there any additional inventory there?

A. I always had my son take care of the books.

Q. To your knowledge was there any additional inventory at the time referred to?

Mr. Hilger: To what date are we now referring?

Mr. Castro: Referring to Exhibit 18, which was the proof of loss on June 1, 1956, containing a statement fixing an inventory of \$15,478.11.

Mr. Hilger: I doubt if any proof of loss was filed on the date given, counsel.

Mr. Castro: I am not talking about a proof of loss.

(Testimony of Hyrum Jensen.)

Mr. Hilger: You stated proof of loss. You may not have meant it.

Mr. Castro: Profit and loss statement.

Mr. Hilger: I am going to object to that as being too remote from the date of June 5, 1956, as to what might or might not have been in there. We have gone back to December 31, 1955, which is six-and-a-half months prior to the fire, and what inventory was there on that date has absolutely no connection.

The Court: Is that what you are reading from, a profit and loss statement for 1955?

Mr. Castro: June 1, 1956, to which is attached a profit and loss statement dated December 31, 1955.

The Court: Then it is a profit and loss statement for 1955 that you are referring to.

Mr. Castro: No, I am referring to a profit and loss statement which is Exhibit 18, which was under date of June 1, 1956, and attached to it on the inside is a profit and loss statement reflecting the inventory as of the close of business in 1955.

Mr. Hilger: And the specific question has to do with the inventory of December 31, 1955, which I submit is too remote in time to have anything to do with the existence or non-existence of an inventory on June 25, 1956.

The Court: I think the objection is good. Mr. Castro, before we recess, I do not quite understand what the financial condition of this plaintiff has to do with the claim of fire loss.

Mr. Castro: We are offering evidence of financial condition relating to motive.

(Testimony of Hyrum Jensen.)

The Court: Relating to what?

Mr. Castro: Motive.

The Court: Then I will sustain your objection until you lay some foundation for it. You mean motive in connection with the charge of arson?

Mr. Castro: That is correct.

The Court: I think in the interest of justice the Court should require some preliminary foundation before permitting that sort of cross examination. I am overruling the [179] objection without prejudice to your renewing this examination in the event that there is some further foundation laid.

Mr. Castro: I understood you were sustaining it.

The Court: I am sustaining the objection without prejudice to your renewing the examination at a later time.

Mr. Castro: Thank you.

The Court: I think I interrupted you.

Q. (By Mr. Castro): Did you receive the original of the letter dated October 8, 1956, addressed to you and Dee Jensen?

A. Did I receive a letter?

Q. Yes. A. No.

Q. Did Mr. Frederick Hilger give you such a letter telling you you had to appear for examination on October 12? A. I don't remember.

Mr. Hilger: We will stipulate that the letter was sent and received.

Mr. Castro: Do you have that letter?

Mr. Hilger: I have the letter.

(Testimony of Hyrum Jensen.)

Mr. Castro: May we offer this in evidence at this time as Defendant's next in order?

The Court: Any objection?

Mr. Hilger: No objection.

(The letter referred to was thereupon received in evidence and marked Defendant's Exhibit H.) [180]

Q. (By Mr. Castro): In that letter I asked you to produce all documents relating to and establishing the title of the property, including the books of account, bills, invoices and other vouchers or certified copies thereof, if originals be lost, covering all the property described in the proofs of loss theretofore filed by you. Do you recall that?

A. No, I never. Why should I do that, because you had access to all the records at all times down at the buildings. The doors were burned down, and I was refused to take them out, and the insurance men were going over them real often.

Mr. Castro: I move to strike that as not responsive to the question.

Mr. Hilger: I think the witness is confused about the subject matter of this letter. The record reveals about August 8th——

Mr. Castro: I would like the ruling, your Honor, on my motion.

The Court: You have me confused, too. All this seems to me to be somewhat immaterial and time-consuming.

Mr. Castro: This is the basis for the invoices which have been requested.

(Testimony of Hyrum Jensen.)

The Court: The letter has been received in evidence. Now what do you want from the witness?

Q. (By Mr. Castro): Did you produce any of the invoices that we asked to have produced in the letter of October 8, 1956? [181]

A. I had a request from Mr. Hilger—I don't remember what time it was—to go down and pick up all the invoices and everything I could find in the building, and they were scattered from the office back all over, and I did pick up everything that I could find that had any writing on, and brought them up to Mr. Hilger's office.

Q. Thereafter were you told that there were no records relating to sales to you of merchandise during 1956 found?

A. No, I didn't talk to anybody about it.

Q. You had no conversation after you took the records to Mr. Hilger's office?

A. He asked me if that was all, and I said yes, all I could pick up. The biggest part of them was rotted and wet.

Q. After that they were brought to the office, and didn't you receive a notice requiring the production of invoices for purchases during 1956?

A. No, I did not.

Q. Didn't Mr. Hilger tell you that you were to produce invoices for purchases during 1956?

A. Yes, sir, he did. That is what I went down and picked up.

Q. Did you produce any invoices for purchases during the year 1956?

(Testimony of Hyrum Jensen.)

A. I don't know. They are all in——

The Court: Let me shorten this. I think I see what [182] counsel is getting at.

Q. Did you, after your lawyer told you, and you went down and handed up your records——

A. I did.

Q. ——did you turn over all of the records you could find? A. Yes.

Q. Were there any records that you found that you did not turn over?

A. No, sir, there was none that I knew of.

Q. Did your lawyer tell you there were not any invoices for 1956 in the records which you turned over? A. No, I don't believe he did.

Q. (By Mr. Castro): Did your lawyer ever ask you to get copies of sales invoices for 1956?

A. No.

The Court: Perhaps we had better take a recess at this time. I think I will ask you to come back a little earlier today and see if we can't move along in this case. We will adjourn until a quarter to two. [183]

Wednesday, September 25, 1957

1:45 o'clock p.m.

Mr. Castro: At the recess I was handed a copy of the 1955 tax return of Mr. Jensen, your Honor, by counsel, and I would ask that it be marked for identification at this time.

(The copy of the income tax return referred to was thereupon marked Defendant's Exhibit I for identification.)

(Testimony of Hyrum Jensen.)

Q. (By Mr. Castro): Mr. Jensen, following receipt of our letter of October 8, 1956, which is Defendant's Exhibit H, did you look for any of the invoices that were requested?

A. I never received the letter at all at no time.

Q. Would you look at this letter, Mr. Jensen, and tell me whether you recall that you received that letter? A. No, sir, I never did.

Mr. Hilger: I think to save time it can be stipulated that it was received and directed to my attention, and I discussed it with the witness on or about the day its date bears.

The Court: Counsel, in order that there will not be any misunderstanding about it, I see this letter is addressed to the counsel.

Mr. Castro: No, it is addressed to Mr. & Mrs.——

The Court: It was in care of Frederick Hilger, Attorney at Law; so obviously he got the letter and not the——

Mr. Hilger: And I stipulated twice that I did get [184] the letter and that I discussed its contents with Mr. Jensen after examination of the record was made by Mr. Stearns and Mr. Mitchell, representatives of the Boston Insurance Company.

Q. (By Mr. Castro): Now on October 12th during your examination under oath did we discuss the subject of whether you were to obtain copies of the invoices which were missing?

A. I don't remember whether we did or not. If I said I did in this it would be correct either way.

(Testimony of Hyrum Jensen.)

Mr. Castro: At this time, your Honor, I would ask to read into the record from the examination under oath page 154, commencing at line 19, counsel, to page 155, line 19:

“Q. (To Mr. Jensen) Now, with reference to the documents have you requested any of the people that sold you merchandise to give you copies of vouchers, invoices or bills showing the merchandise that you have received?

“A. Well, we already had those bills.

“Q. You have all the bills then for the merchandise that was received?

“A. Yes, did have. I don't know whether we got them now or not.

“Mr. Castro: Now on the records that have been produced, Mr. Hilger, those contained in this container, do they contain any invoices?

“Mr. Hilger: They contain certain invoices, [185] yes, the remainder of the invoices are down at the office available for your inspection. They are bulky and also quite dirty.

“Mr. Castro: Those are the invoices which Mr. Stearns saw earlier, isn't that right?

“Mr. Hilger: Yes. I think the record should also reveal that notice of intention to take this deposition was not received until October the 10th, two days ago. It has been impossible to get any copies made of any missing invoices; in the interim if there is any specific request made, why, I feel—be assured that we're quite willing to have such copies prepared, but we'll have to have a little more time.

(Testimony of Hyrum Jensen.)

“Mr. Castro: That’s satisfactory on that, and I can give Mr. Stearns the information and he can write the letter directing your attention to what invoices he wants.

“Mr. Hilger: That’s satisfactory.”

Mr. Hilger: I have no objection to that.

Q. (By Mr. Castro): After that examination under oath, Mr. Jensen, did you ask any of the people who sold to you for copies of invoices?

Mr. Hilger: I object. The offer here was in request for specific invoices, they would then be furnished. There is [186] nothing in the record to show any request was made for specific invoices after that date.

Mr. Castro: You have our letter of October 19, 1956?

Mr. Hilger: I have many letters.

The Court: Now we are getting into correspondence between the attorneys concerning these matters, but that has nothing to do with it. Let us get through with this witness. He didn’t know anything about that apparently.

Q. (By Mr. Castro): Did Harold Dee Jensen appear for the examination under oath?

A. Yes.

Q. Did Harold Dee Jensen appear for the examination under oath on October 12, 1956?

A. I don’t think he did at that time.

Q. Did he appear at the office on that day?

A. No, not that I know of.

Q. Did he appear on any other occasion prior to

(Testimony of Hyrum Jensen.)

the time you filed the lawsuit for examination under oath?

Mr. Hilger: I will object. This is totally immaterial. There is no showing that it was the duty of Harold Dee Jensen to appear any place at the request of the insurance carrier. He was not the insured under the policy.

The Court: I will sustain the objection.

Q. (By Mr. Castro): Did you see Harold Dee Jensen on the morning of the examination under oath? [187]

A. Under my examination——

Mr. Hilger: Objection.

The Court: Same ruling.

Mr. Castro: I would like to lay a foundation, your Honor. That is what I am trying to do.

The Court: What difference does it make whether he saw him or did not see him? What has that got to do with it?

Mr. Castro: There are cases that hold, your Honor, that you are entitled to examine the employee under oath on these losses.

The Court: What has that got to do with the examination of this witness? If you want to make a point of it all you have to do is to show you requested the examination but he did not appear. I do not see how that is material in the examination of this witness.

Mr. Castro: I want to show this witness sent him out of town that morning.

The Witness: That is a lie.

(Testimony of Hyrum Jensen.)

Mr. Hilger: Does that answer the question, counsel?

Mr. Castro: I move to strike that out as not responsive.

The Court: I don't know. You brought it on yourself, counsel. You made a statement as an officer of the Court that this witness did something that is not only unconscionable but perhaps unlawful, and he has a right to respond to that. I will [188] allow the answer to stand.

Mr. Castro: May I cross examine him?

The Court: I will hold that this type of examination is at this point immaterial.

Mr. Castro: Then may I ask that the answer be stricken from the record, since I am deprived of cross examination?

The Court: No. I will allow the answer to stand for the reason I have stated. I am not going to elaborate on it. I have already stated the reason for the Court's ruling.

Q. (By Mr. Castro): On the morning of the examination under oath did you furnish Dee Jensen your car to leave the City of Eureka?

Mr. Hilger: I will object to that as totally immaterial.

The Witness: I can answer. No.

The Court: I will sustain the objection.

Q. (By Mr. Castro): On the morning of the examination under oath, did you know that Dee Jensen was requested to appear for that examination under oath?

(Testimony of Hyrum Jensen.)

Mr. Hilger: I object to that as immaterial.

The Court: Sustained.

Q. (By Mr. Castro): On the morning of the examination under oath you sent Dee Jensen out of the City of Eureka, didn't you?

Mr. Hilger: I will object to that and cite it as [189] misconduct of counsel, in addition to being immaterial.

The Court: I will sustain the objection, and if counsel persists in this examination I will take further measures. You have already asked that question and he answered it in quite emphatic terms, and I do not think there is need to repeat it.

Mr. Castro: May I make an offer of proof in that regard, your Honor?

The Court: If you want to make an offer of proof we will excuse the Jury. I do not want you to have any prejudice as the result of it.

Mr. Castro: I would like to make an offer of proof on the subject.

The Court: All right. Take the Jury out for a brief recess.

(Thereupon, the Jury left the Courtroom, and in their absence the following occurred:)

Mr. Castro: Referring to page 153 of the examination under oath, I offer to prove the following, commencing at line 26:

"Mr. Hilger: I directed Mr. Dee Jensen's attention to the fact that he had been requested here.

"Mr. Castro: The record can show that he has not appeared here today, is that correct?

(Testimony of Hyrum Jensen.)

"The Witness: I haven't seen him here. [190]

"Mr. Castro: You say he went to Orick?

"A. I think he did. He was talking about it, Orick or Arcata, I don't know which, don't know how long he was going to go or anything about it.

"Q. Is he working at the present time?

"A. Once in awhile.

"Q. For whom? "A. For me.

"Q. Where? "A. In the yard.

"Q. Is he working for you today?

"A. Yes, sir.

"Q. What did you send him to do?

"A. Buy some lumber.

"Q. Where?

"A. Arcata, Brookings or Orick, anywhere he could buy some.

"Q. And did you furnish him transportation for it? "A. Yes, sir."

Page 152, commencing at line 18:

"Mr. Castro: Now where is your son Dee today?

"A. I don't know, up in Orick somewhere.

"Q. Did you see him today?

"A. Yes, this morning. [191]

"Q. Did you see him here in Eureka today?

"A. Yes.

"Q. Did you talk to him? "A. Yes.

"Q. Have you talked to him about appearing here at this examination today?

"A. I told him I was going to be here.

"Q. Did you request him to be here?

"A. No, sir.

(Testimony of Hyrum Jensen.)

“Q. Did you ask him whether he was going to be here? “A. No, sir.

“Q. Did he tell you that he had been requested to be here? “A. No, sir.

“Q. How did you receive your request to be here? “A. Mr. Hilger asked me.

“Q. Did he give you any letter?

“A. No, sir.

“Q. Did he tell you how he happened to make that request?

“A. Told me he wanted me to come up and take an oath and testify.

“Mr. Castro: Mr. Hilger, did you give him the letter which we sent in care of you for him? [192]

“Mr. Hilger: No, I didn't. I directed him—his attention to the fact that he was called up here to testify as per request contained in the letter.

“Mr. Castro: Did you receive the original letter?

“Mr. Hilger: Yes.

“The Witness: I imagine.

“Mr. Castro: And also addressed to Dee Jensen, did you call it to his attention?

“The Witness: No, I didn't.

“Mr. Castro: I am asking Mr. Hilger.”

And then it continues from the point I just started to read. The record and the evidence so far, apart from this subject matter, is that the witness has constantly referred to the fact that Dee Jensen had charge of the inventory. Dee Jensen had charge of the information that went into the inventory. He had charge of the information which went into the

(Testimony of Hyrum Jensen.)

financial statements which have been admitted in evidence on Plaintiff's behalf, and this witness states he has no knowledge, and he accepts the word of Dee Jensen concerning what is in there. Those matters are all relevant to the defense of this case, and that was one of the reasons why we had asked for the examination of Dee Jensen.

The Court: What is it that you want to prove? What [193] is it that you want to get?

Mr. Castro: I would like to take evidence such as I have read to this Court at this time, because it would constitute a defense of the failure to produce Dee Jensen at that examination under oath.

The Court: Specifically what is it you want to do, Mr. Castro? Do you want the questions and answers that you read from this record, is that the testimony that you want to present?

Mr. Castro: That is correct, to support the defense in the case that Dee Jensen was required to appear and did not appear at the examination under oath. As part of his employment he was sent out of town.

The Court: You have already elicited from the witness the fact that Dee Jensen was not present at that hearing on that day. You have already brought that out.

Mr. Castro: I wanted to show the further circumstance that his father sent him out of town on that particular occasion when he was requested to be there for the examination under oath.

Mr. Hilger: Number 1, your Honor, if I may

(Testimony of Hyrum Jensen.)

comment a bit, this statement under oath reveals that this witness did not at the time he was called for his examination know that Mr. Dee Jensen had likewise been requested. He so stated in his statement under oath at that time, that he had received a request [194] form to appear, and that he did not know Dee was to appear. I personally notified Mr. Dee Jensen, who was at that time represented by independent counsel, and we could do nothing to require the presence of Mr. Dee Jensen if he decided not to show up. But he was notified. Secondly, and this would seem to dispose of the whole point, the defense simply is not raised in the pleading and it is not responsive to any issue raised in the pleading, and it would be an immaterial defense at this time. It is an affirmative defense. He seeks to show a condition subsequent, something the insured had to do after the fire, and therefore it is a special defense. He has not raised it in his pleadings and I submit, your Honor, it is immaterial.

The Court: This suit is only brought by the witness Hyrum Jensen?

Mr. Castro: That is correct.

Mr. Hilger: That is correct.

The Court: I do not quite understand how there is any materiality to this at all. In fact, it has already been developed, and I will accept counsel's statement that he has just made, that the son was notified but did not appear.

Mr. Hilger: There is an issue raised as to whether or not this insured submitted to examina-

(Testimony of Hyrum Jensen.)

tion, but there is no evidence raised that he or his employees did not submit, and this insured has submitted to a 158-page examination, which is before the Court. Now, the fact that his son when notified did [195] not appear, when this man did nothing to prevent his appearance—he did not even know he was supposed to appear—certainly would not bring itself within the issue raised by the pleading that the insured failed to submit.

Mr. Castro: I think it is for the jury to determine whether or not this man knew his son had been requested to appear, your Honor.

The Court: It only becomes a Jury question if there is some evidence.

Mr. Castro: I wanted to point out to the Court the named insured under the policy is the Eureka Lumber Company, and neither Hyrum Jensen nor Dee Jensen is named as an insured.

The Court: The only one who is making any claim against the insurance company by virtue of a claim and suit is the witness Mr. Hyrum Jensen?

Mr. Hilger: That is correct.

The Court: There is nobody else who can recover against you, and you are not being sued by anybody else. If that does not establish his right of claim against you he is out of Court. It doesn't make any difference whether anybody else has any claim or not. I think that is the only issue in the case.

Mr. Hilger: The only issue, as I see it, that is

(Testimony of Hyrum Jensen.)

raised by the pleadings is whether or not this named insured submitted to an examination, and plaintiff concedes that he did. [196] There is no request for an employee of Mr. Jensen to appear. There is no request that any of his agents be asked to appear. A request was made of a specific individual, and at that time it was made on the theory that he was a partner.

Mr. Castro: There is nothing in the notice to indicate it was made on the theory of a partner or employee.

Mr. Hilger: There was much discussion about it, though, counsel.

The Court: I can see nothing in your offer of proof, counsel, that is material to any of the issues in this case. Also I think if the Court were to permit it to go in, because of the fact that jurors are sometimes prone to draw inferences and conclusions from attorneys' assertions, it might work an undue prejudice to the plaintiff in this case whose rights are before the Court, as well as the rights of the defendant. I can see no possible materiality to this except some sort of atmosphere, coloring matter, but it has no materiality to the issues of this case as far as I can see. I will hold that the subject matter as described by counsel in his offer of proof is immaterial.

Mr. Castro: I would like to call the Court's attention to one case on the subject matter, *Hart vs. Mechanics & Traders Insurance*, 46 Fed. Sup. 166, where it points out the purpose of the provision for

(Testimony of Hyrum Jensen.)

an examination under oath of an insurance policy is to protect the insurer against fraud by [197] permitting it to probe into the circumstances of the loss, including an examination of the insured or his agents. It constitutes a bar.

The Court: There is nothing to stop you from urging any legal defense that you have. I am not ruling on any of your defenses. The only question is whether it is material to the examination of this witness at this time. If you establish, as I assume you are able to, that the other man, Dee Jensen, did not appear and did not give his examination, then you can make that legal point at the time, whenever you deem it proper to do so, but I do not see that the subject matter you are urging in your offer of proof is material examination of this witness.

Mr. Hilger: Under the policy provisions only the sworn statements of the insured are required and not the insured and/or his agents.

The Court: Counsel, that is a legal question that may be presented at some time or other as a defense by your opponent and you have an answer to it. All I am going to rule on now—and I think it has been a waste of time—is with respect to the examination of this witness on a matter that apparently is not subject to any dispute, namely, that Dee Jensen did not appear and his examination was not had. What the consequences of that are is a legal question. For the reason I have stated, I will hold that the subject matter in [198] the

(Testimony of Hyrum Jensen.)

examination of this witness disclosed in your offer of proof is not material and it should be rejected. I think we had better bring the Jury back.

(Thereupon the Jury resumed their places in the Jury boxes, and the following occurred in the presence of the Jury:)

The Court: You may proceed, counsel.

Q. (By Mr. Castro): With reference to your method of doing business, Mr. Jensen, did you have a bank account at the Crocker-Anglo Bank during 1954, 1955 and in 1956? A. Yes.

Q. Was that where all the moneys that were received from the sale of merchandise were deposited? A. Most of it.

Q. Did you deposit everything there except for petty cash? A. Yes.

Q. And on petty cash did you leave a slip in your cash register when you took petty cash?

A. I did, yes.

Q. Did your Eureka Lumber Company have a complete set of books to show its business?

A. Yes, we did.

Q. Where any of those books destroyed in the fire? A. Yes.

Q. What of the books were destroyed in the fire? [199] A. I don't know.

Q. Where were the books kept?

A. Some of them was in the lower office and some was in the upper office.

Q. What books were kept in the lower office?

(Testimony of Hyrum Jensen.)

A. I don't know. I think a lot of the invoices and daily sales were kept in the lower office.

Q. Were the sales invoices, that is, the people you purchased from, were they kept in a metal filing cabinet?

A. Some of them were in a metal filing cabinet and some was in wood.

Q. Were they kept in the desk section of the downstairs office?

A. Some were in metal—yes, they were. We had two offices. One was my son's office and the other one was the bookkeeper's office.

Q. At the time of the fire in June of 1956, Dee Jensen had moved his office to the upstairs section, had he not?

A. He had a new office upstairs, yes.

Q. The bookkeeper at that time was Ellen Van Harpen?

A. We had two bookkeepers at that time.

Q. Was Ellen Van Harpen one of the bookkeepers at the time of the fire?

A. Yes, she was.

Q. And she worked downstairs? [200]

A. Yes.

Q. And she took care of the invoices, didn't she?

A. Yes.

Q. And she worked behind this desk which is shown in Exhibit G? A. Yes.

Q. Is that where the metal cabinet was kept, where the invoices were?

(Testimony of Hyrum Jensen.)

A. I believe there was a metal cabinet there, as well as the wood desks.

Q. Was the wood desk destroyed or damaged in the fire?

A. No, sir. It was damaged by water and smoke.

Q. Did you see the accounts receivable book after the fire? A. No, sir.

Q. Did you see the accounts payable book after the fire? A. No, sir, I did not.

Q. Did you see the general ledger book after the fire? A. No, sir.

Q. Did you see the cash and sales journal after the fire? A. No, sir, I did not.

Q. Were any of those books damaged or destroyed in the fire? A. That I don't know.

Mr. Hilger: I object to that. How can he know what happened to them if he has never seen them after the fire?

Q. (By Mr. Castro): Did you look for any of those books [201] after the fire?

A. I did not, no.

Q. Weren't those books kept on the shelves, underneath the counter shown in Exhibit G?

A. They could have been. They could have been under the shelves where we had a file for them. There were many books, hundreds of them.

Q. Was the accounts receivable book kept in a ledger form book?

A. I imagine they were. Did you mean to wholesale or retail?

(Testimony of Hyrum Jensen.)

Q. Both.

A. I imagine they were, yes.

Q. Were the accounts payable records kept in a ledger form?

A. We kept a complete set of books.

Q. When is the first time you made up your mind as to how much inventory you had at the time of the fire?

A. I never made up my mind at no time. I hired two men to go down and take an inventory after the fire.

Q. You do not know what the inventory was at the time of the fire, do you? You do not know what the inventory was in the building at the time of the fire, do you?

A. Yes, I do. I knew what was in it, yes.

Q. I will ask you to look at the examination under oath, page 61, commencing at line 26, to page 62, line 4.

A. Down to five, did you say? [202]

Q. Yes, to that question. A. Okay.

Q. On October 12th in the examination under oath did I ask you these questions and did you give these answers:

“Q. How much merchandise did the Eureka Lumber Company have at the time of the fire?

“A. I couldn’t say. I don’t know what their records show. The bank has a statement of the amount or finances at that time or sometime about that time. Now I don’t know how much there was.”

Did you give those answers to those questions?

(Testimony of Hyrum Jensen.)

A. Those answers are correct.

Q. For several months prior to this fire, Mr. Jensen, had the business been falling off?

A. Yes, it had.

Q. Had it started to fall off sometime in the fall of 1955?

A. I think it had. It was a general slump with everyone.

Q. And was it continuing to get worse up to the time of the fire?

A. Well, it probably was a little worse.

Q. You owed considerable money at the time of the fire, didn't you?

A. Yes, we did.

Q. How much was it?

A. I don't know how much it was. [203]

Q. Could it be as much as \$20 to \$30,000?

Mr. Hilger: I object to that as asked and answered. He said he didn't know how much it was.

The Court: I will sustain the objection; also on the ground that it is incompetent and immaterial at this point in the case. I think I covered that in a ruling I made earlier.

Mr. Castro: I understand that. We will reopen that in the defense of the case.

Q. Have you been an employee of Harold Dee Jensen?

A. Have I been?

Q. Yes.

A. I worked with Harold Dee Jensen but I have never been an employee of his.

Q. Weren't you an employee of his with relation to the sawmill on the Hanson Road?

(Testimony of Hyrum Jensen.)

A. I worked with him a lot.

Q. Didn't you work there as an employee of Harold Dee Jensen?

A. I worked with him, yes.

Mr. Hilger: I will object to this until we establish what period of time we are talking about.

The Court: Is he talking about this property?

Mr. Hilger: No.

Mr. Castro: Property which was transferred for this property, your Honor.

Mr. Hilger: In 1955 a sawmill was transferred and [204] exchanged for the Eureka Lumber Company as part of the purchase consideration when Mr. Jensen acquired the Eureka Lumber Company. That would have to go back prior to 1953.

The Court: This question goes to the right of ownership of the plaintiff in this claim.

Mr. Castro: Yes, to the acquisition of this property which is involved in this claim.

Mr. Hilger: I consider it is too remote to have any bearing.

The Court: There is no question pending now.

Q. (By Mr. Castro): Was Harold Dee Jensen your employer at that time? A. No.

Q. Did Harold Dee Jensen run into financial difficulties in that operation on the Hanson Road?

A. I don't know.

Mr. Hilger: I object to that as going too far afield, your Honor, incompetent, irrelevant and immaterial.

The Court: I will sustain the objection.

(Testimony of Hyrum Jensen.)

Q. (By Mr. Castro): What is a cut-off plant?

A. What is a cut-off plant?

Q. Yes. A. I don't know.

Q. Did you ever buy a cut-off plant with Harold Dee Jensen? A. No. [205]

Q. Did you ever trade any property with Harold Dee Jensen or anybody else for a cut-off plant?

A. Not that I remember.

Mr. Hilger: I object to this until we establish what he is talking about. He could go back to 1928 so far as I know now.

Q. (By Mr. Castro): Did you have a cut-off plant at this property that was involved in this fire?

A. I don't know what you mean by a cut-off plant.

Q. You have never heard of the term before?

A. No, I have not, not in the lumber business.

Q. I will show a photostatic copy certified by the Recorder's Office at Eureka, California, and ask you if your signature is on that document?

A. Well, if you are referring to a cut-off plant, that means the yard, Eureka Lumber Company.

Q. First, is that your signature on the original of that document? A. Yes, it is.

Q. Is that your wife's signature on the original of that document? A. I think it is.

Q. Is that the signature of Harold Dee Jensen?

A. I think so.

(Testimony of Hyrum Jensen.)

Q. Is that the signature of the wife of Harold Dee Jensen? [206] A. I don't know.

Q. Who is Eula Jensen?

A. That used to be his wife.

Q. And her signature appears on that document, too, doesn't it?

A. There is a Eula Jensen on there.

Q. Does that document refer to a cut-off plant?

A. Yes, it does.

Q. What is a cut-off plant?

A. I don't know.

Q. What was being acquired under that document that is described as a cut-off plant?

A. I think it is the Eurkea Lumber Company, it probably means.

Q. In other words, this document where it states "to trade a cut-off plant and equipment (subject to sales contract) located at 210 Broadway, Eureka, California"—is that the Eureka Lumber Company?

A. Yes.

Q. The westerly boundary of this property is Broadway, is it not? A. Yes.

Q. Was there a cut-off plant on that property?

A. No, sir.

Q. What was this document referring to [207] when it described it as a cut-off plant?

A. I don't know. I think it would be referring to a little yard that we had on the Bear Road site across Broadway.

Mr. Castro: I offer the document into evidence as Defendant's next in order.

(Testimony of Hyrum Jensen.)

Mr. Hilger: I object to this as incompetent, irrelevant and immaterial to any issue in this case. It does not show who was acquiring, who was transferring. It is nothing in the world but a mutual release.

Mr. Castro: I offer the document.

Mr. Hilger: I have no objection to the authenticity of the document, Your Honor. It is just that it is immaterial and incompetent to prove anything that is in issue in this case.

The Court: It seems to have been drawn up by attorneys, but I have some difficulty in understanding it.

Mr. Hilger: It was not our office, Your Honor.

The Court: Apparently it was a 1953 transaction. I will sustain the objection on the ground it is too remote to this controversy. I think we have enough to do to try the problem of the claim here in 1956.

Mr. Castro: May we have it marked for identification?

The Court: Certainly.

(The document referred to was thereupon marked Defendant's Exhibit J for identification.)

Q. (By Mr. Castro): Immediately after [208] the execution of that document didn't you and Harold Dee Jensen take possession of the Eureka Lumber Company?

A. I did but Harold Dee Jensen never did.

Q. You were only the manager of that company, weren't you?

(Testimony of Hyrum Jensen.)

A. I owned the company. I owned the sawmill we traded for it.

Q. Didn't you hold yourself out as the general manager of that company?

A. No, sir, I was the owner.

Q. You never held yourself out as general manager? A. I was general manager and owner.

Q. I will show you Exhibit 18. Is that the letter-head of the Eureka Lumber Company?

A. That is right.

Q. You are shown as general manager of that company?

A. Yes, sir, and that includes the owner.

Q. Harold Dee Jensen is shown as the sales manager of the company? A. That is right.

Q. Harold Jensen ran the Eureka Lumber Company, didn't he? A. No, sir.

Q. Did Harold Jensen set up the books of account of the company?

A. Yes, he did, under my jurisdiction.

Q. Did Harold Jensen buy the lumber of the company? [209]

A. A lot of times he did, yes.

Q. Didn't he buy 90% of the lumber?

A. No—well, he bought a lot of the lumber. I don't know what percentage.

Q. Didn't you and Harold Jensen each have a drawing account at the Eureka Lumber Company?

A. No, sir.

Q. Didn't Harold Jensen take care of all the accounts payable?

(Testimony of Hyrum Jensen.)

A. He would pay them when they would become due, yes, with my signature on the check and nobody else's.

Q. Did you let him determine what was payable?

A. That is true.

Q. He handled the purchase of the real estate there, didn't he?

A. Yes, he did. He was my agent.

Q. In fact, you owed him money, didn't you?

A. No, sir.

Q. You did not owe Harold Dee Jensen money?

A. No, sir. Harold Dee Jensen owed me money.

Q. I will ask you to look at the examination under oath, page 72, starting at the top of the page, referring to the fresh water property, down to line 16. Will you read those questions and answers to yourself.

A. Yes, I have read them all. [210]

Q. The fresh water property is one of the pieces of property listed in that profit and loss statement, is it not?

A. That was a mistake.

Q. That was Dee's property, wasn't it?

A. Yes, it was.

Q. And that was purchased sometime in April, 1956?

A. I don't know just when it was purchased.

Q. Was it purchased during the year 1956 prior to the fire?

A. I don't know the date of it.

Q. Did I ask you these questions and did you give these answers:

Q. Didn't you own that property at the time of the fire?

"A. No, sir.

(Testimony of Hyrum Jensen.)

“Q. When did Dee acquire it?

“A. Got it in the first place.

“Q. Did you make any payments on that property?
“A. Did I?

“Q. In Freshwater, yes.

“A. I may have loaned him some money or something I don't know.

“Q. Is that your best recollection that you loaned him money for the property at Freshwater?

“A. I didn't loan him any money. I may have paid him some money we owed him down [211] there and he paid it.

“Q. What's your best recollection as to whether you turned any money over to Dee on account of that property in Freshwater?

“A. I never did turn any over, on account of the property. If he got any money from me, it was what we owed him.”

Did you give those answers to those questions?

A. Yes.

Q. Is it true you owed Dee Jensen money at the time of the purchase of the Freshwater property?
A. Dee Jensen owed me money.

Q. Dee Jensen cleared up his financial difficulties in 1955 by going into bankruptcy, did he not?

A. I don't know. I heard he did go into bankruptcy.

Q. Did he live at your home during 1955?

A. Yes, he did.

Q. And that was your home in Eureka? Did he

(Testimony of Hyrum Jensen.)

live at your home in 1956 up to the time of this fire? A. Yes, sir.

Q. Following his adjudication in bankruptcy didn't he open up a bank account?

A. He could have done.

Q. Didn't you sign checks transferring money from your account in the Crocker-Anglo Bank to his account? [212]

A. Yes, sir, many a time I did. He would go out and buy a large quantity of lumber and he would give them his check and I would reimburse them with my check.

Q. And he maintained that account right up to the time of the fire, using moneys which were coming from the Eureka Lumber Company, didn't he?

A. He never did get any money from the Eureka Lumber Company unless he had bought lumber and given his own check for it, which I would sometimes go up and make a deposit for him in order to keep his check from bouncing, in other words.

Q. You were having trouble with your checks bouncing in 1956 before this fire, were you not?

A. No, sir.

Mr. Hilger: I object to that.

The Court: I will sustain the objection. Counsel, this is not a proper subject of inquiry in this case at this time. A man could be bankrupt and still have a perfectly legitimate claim for fire loss against an insurance company. The only question involved is, What is the validity of his claim? Not whether he

(Testimony of Hyrum Jensen.)

is a poor man or a rich man. I will hold this whole line of inquiry, which I have ruled on before, is immaterial.

Q. (By Mr. Castro): Was Harold Dee Jensen in 1956 running all his transactions through the Eureka Lumber bank account?

A. Did he, did you say? [213]

Q. Yes. A. I don't know.

Q. I ask you to look at your examination under oath again.

A. I knew he had a bank account down there because I would deposit money for him, a lot of it.

Q. I ask you to look at page 43 of your examination under oath.

A. I still answer I don't know.

Q. In the examination on October 12th did I ask you these questions and did you give these answers:

Mr. Hilger: Where are we reading from now?

Mr. Castro: Page 43, line 23, to page 44, line 6:

"Q. Did he (referring to Dee) have any other income from the business? "A. No.

"Q. Did he work any place else?

"A. No, not that I know of.

"Q. That was his sole source?

"A. He may have worked some for himself on some deals. I don't know about that, though.

"Q. What's your best recollection or knowledge on the subject?

"A. I think that probably everything was run through the Eureka Lumber Company."

(Testimony of Hyrum Jensen.)

Did you give those answers to those questions?

A. That is true. There was times after the fire that I did let my son operate under the Eureka Lumber Company name. I was burned out and I had no place of business.

Q. He was operating under the Eureka Lumber Company name prior to the fire, too, wasn't he?

A. No, he was not. Never. He would buy lumber for the Eureka Lumber Company.

Q. At the time of the fire there was certain trucking equipment which the Eureka Lumber Company was buying, wasn't there?

A. I didn't hear what you said.

Q. At the time of the fire there was certain trucking equipment which the Eureka Lumber Company was buying?

A. Yes.

Q. Consisting of four units?

A. We had four or five trucks, yes.

Q. And you had those financed through the General Motors Finance Company or the Yellow Motors Acceptance Corporation?

A. Yes, I think we did.

Q. After the fire you transferred all those four trucks to Harold Dee Jensen, didn't you?

Mr. Hilger: I object. It is immaterial what he did after the fire.

Mr. Castro: It goes to show the course of conduct between them, your Honor, as to whether or not Dee Jensen had [215] any interest in the proceeds of this insurance.

Mr. Hilger: What may have led to a transfer,

(Testimony of Hyrum Jensen.)

if such occurred—and I certainly do not know whether it did or did not—but whatever took place after this fire certainly would not tend to or be admissible to establish retroactively any pre-existing relationship or any relationship at the time of the fire.

The Court: It is too hard for me to rule on that in the present state of the record. I will allow the question, and if it develops that it is immaterial, I will instruct the Jury to disregard it.

Q. (By Mr. Castro): Following the fire did you transfer those four units to Harold Dee Jensen?

A. We tried to. He was going to take over the trucking deal because I was all through with the lumber business, and they didn't transfer them.

Q. Did he pay you anything for those four units? A. No, no, he was going to.

Q. (By the Court): Your answer is that you did not transfer these trucks after the fire to your son?

A. That is right. We tried to but they wouldn't transfer them.

Q. So you didn't transfer them?

A. No.

Mr. Hilger: I move that the entire matter be stricken. [216]

Mr. Castro: We will have evidence to offer on that, your Honor, the official records concerning it.

The Court: Let the answer stand for the time being.

Q. (By Mr. Castro): Isn't it true, Mr. Jensen,

(Testimony of Hyrum Jensen.)

immediately after the fire occurred you kept yourself out of trying to present any claim for this insurance?

Mr. Hilger: What was the question? I can't follow this.

The Court: I think you had better *refrain* that.

Q. (By Mr. Castro): Isn't it a fact that you kept your nose out of how Harold Dee Jensen was running the Eureka Company at the time of the fire?

Mr. Hilger: I will object to that, the use of the words "keeping his nose out."

Mr. Castro: I am using language that he used before, your Honor. I apologize for that expression, but that is language which he has used before.

The Court: You have gone over this pretty much with this witness as to just what the son did in the business and now you want to get something about a nose in it.

Mr. Castro: That is only because the witness used the expression himself.

The Court: I will sustain the objection.

Q. (By Mr. Castro): Did Harold Dee Jensen [217] take care of all the records and inventory after the fire?

Mr. Hilger: I object to that as asked and answered many times.

The Court: I think this question was directed to after the fire.

Mr. Castro: That is right, immediately after the fire, your Honor.

(Testimony of Hyrum Jensen.)

A. Yes, he did.

Q. (By Mr. Castro): Do you know what he found with the records?

A. That was his records.

Q. Do you know what he found with the records? A. I didn't get the answer.

Q. Do you know what he found with the records? A. What he found with them?

Q. What records he found.

A. No, I do not.

Q. You say that was only his records that he took care of?

A. No, no. He took care of all the records. You asked me what he found. I don't know.

Q. Do you recall the accountant that was there for the Boston Insurance Company at your office with Mr.—his name was Russell Stearns, with you and Dee Jensen?

A. I didn't get the question.

Q. Do you recall an occasion after the fire when [218] Russell Stearns, the accountant for the Boston Insurance Company, was present at your office?

A. It seems like I remember somebody but I don't remember the name.

Q. Was Harold Dee Jensen there at that time?

A. I can't remember. I don't even remember if I was there.

Q. You have no recollection of a meeting with an accountant from the Boston Insurance Company?

A. No, I really don't. There were so many in-

(Testimony of Hyrum Jensen.)

surance people there that I don't know them by names.

Q. Mr. Jensen, when the Eureka Lumber Company commenced to operate at this location, did you change the locks on the doors of the building?

A. No, we did not. Not for a long time after.

Q. Prior to the time of the fire on June 25th did you change the locks on any of the doors to the building?

A. I believe we did on a little office, the one that we had down in the lower yard. It was broken. That is here (indicating). We didn't change it because it was supposed to be changed. It was broken. Somebody tried to break into it.

Q. That is an office building that is somewhere west——

A. In the open yard. It wasn't an office. It was a storehouse where we kept saw blades, hammers.

Q. This door to which I am pointing, is that the front door of the building? [219]

A. Yes, it is.

Q. Is that the door for going into the downstairs office which has been shown in the picture?

A. Yes.

Q. Is that the door that enters to go upstairs to the second floor? A. Yes.

Q. Before the fire, and after possession was taken of the property, did you change the lock on that door? A. I believe we did.

Q. Did you put a new lock on the door?

A. If I remember right, we did.

(Testimony of Hyrum Jensen.)

Q. Did you have keys to that new lock?

A. Yes, we did.

Q. Were the persons who had those keys yourself, Ellen Van Harpen, and Harold Dee Jensen at the time of the fire? A. Yes.

Q. Was that the only outside lock that you had on that building?

A. We had many other locks that was locked on the inside, but that was the only one that had a lock on that we opened with a key in the building.

Q. That was the one door which was used to enter from the outside?

A. That is right. [220]

Mr. Castro: May we mark it with a Roman numeral I, your Honor.

Now, there are other doors in the building, aren't there? A. Naturally, yes.

Q. There was a door marked "Loading Door" on the east wall of the building? A. Yes, sir.

Q. Does that door open on the outside or is it locked from the inside?

A. It is locked from the inside.

Q. May we mark it II, and what was the nature of the inside lock?

A. It seems like we had a hasp and staple and a bolt that ran through it. I don't recall exactly what it was, but we had a lock on it.

Q. Was there a door at the northeast room to which I am pointing? A. Yes, there was.

Mr. Castro: May we mark it number III.

(Testimony of Hyrum Jensen.)

Q. Was that door locked from the inside or the outside? A. Inside.

Q. What type of inside lock did you have for it?

A. We had a big hook about that long (indicating), and we put that long piece with a hook on it, bent over, and it hooked into a big hasp. [221]

Q. With reference to the room next to that, was there a door to which I am pointing?

Mr. Castro: We will mark that Roman numeral number IV.

Q. Was that a door which was locked from the inside or the outside? A. This, inside.

Q. What type of lock did it have on the inside of that door?

A. I think we had a long chain or a heavy wire, I don't remember which it was, fastened up or bolted up on one of the timbers.

Q. The office or the warehouse section of this shed, the building only had this other door to which I am now pointing?

A. You mean from the outside?

Q. Yes.

A. That went into the outside shed, yes.

Mr. Castro: May we mark it with Roman numeral number V.

Q. Was that door locked from the inside or the outside?

A. It was locked from the inside.

Q. What type of lock did it have?

A. I think it had a hook and a staple also, or a bolt running through a staple.

(Testimony of Hyrum Jensen.)

Q. You referred to a Kaiser automobile. That was kept in this particular room? [222]

A. Yes.

Q. Had that Kaiser automobile been used on the day of the fire? A. No, not that I know of.

Q. Was that Kaiser parked in this general area?

A. Yes, it was. That is where we stored it.

Q. How long since that Kaiser had been taken out of that room before the fire?

A. I can't remember. It had been quite awhile.

Q. Was it approximately two weeks before the fire the last time you used it?

A. It seems like we took it out and took the welder out of it, which probably could have been two months ago before that, and we put the welder out in front in the shed part.

Q. Was the door number V used to go from the office out into the open shed or did you keep that locked at all times?

A. Well, we used it if we wanted to. At night we would lock it. If it was necessary to get merchandise out of there, we would unlock it.

Q. Isn't it a fact that it was the practice to come out in the walk area?

A. Wasn't it what?

Q. Wasn't it your practice to come out onto the walk area instead of using door number V?

A. I don't know. We come out both ways, but [223] generally I think there was quite a pile of lumber and stuff piled against that one door. I

(Testimony of Hyrum Jensen.)

don't know if we used it very often, but if we wanted to use it, it could be used.

Q. At the time of this fire you indicated there was redwood molding up to the point of that door.

A. That's right.

Q. Wasn't that the reason you walked around the outside of the door?

A. Well, we used both doors.

Q. I will ask you to look at the examination under oath at page 141 commencing at line 14 to line 25. Will you read those questions and answers to yourself?

The Court: I do not know why lawyers practicing in the State Court follow this procedure of asking a witness to read something to himself first. You can just as well read it aloud to him and he can follow it.

Q. (By Mr. Castro): In your examination under oath on October 12th did I ask you these questions concerning that door number V and did you give these answers? A. Yes, you did.

Q. And did you tell me at that time, "A. The door, it's sitting right here. We could open it if we wanted to." A. That is right.

Q. "We never used it. We would go outside and come around the big doors here, was solid doors, and we just shut them." [224]

A. That's right.

Q. Does that refresh your memory now as to whether you used that doorway number V?

The Court: Counsel, he has not made any men-

(Testimony of Hyrum Jensen.)

tion with respect to this matter and I do not see the materiality of it. What difference does it make what doors they went through?

Mr. Hilger: I object on the ground it is incompetent, irrelevant and immaterial, not contradictory, and therefore not proper cross examination.

The Court: I will sustain the objection.

Q. (By Mr. Castro): When you came back after the fire alarm sounded did you try to go into that front door which is number I?

A. Yes.

Q. Was it open or closed?

A. It was open, as far as I remember. I was very excited. I tried to go in and pick up some records, and one of the policemen stopped me.

Q. Isn't it a fact that it was closed and locked when you got there?

A. I am not saying for sure. I know I was there in time to see the firemen bust this big plate glass out in front, and I made for the door and some of the police officers grabbed me.

Q. You never tried that door when you returned then? A. I don't remember, sir. [225]

Q. With reference to the building before the fire, what time did you leave the building?

A. I imagine about five minutes after 12.

Q. What time were you returning to the building?

A. If I remember right, it was near half-past 12. I didn't look at my watch and make it exact, but it was long enough for me to order a sandwich

(Testimony of Hyrum Jensen.)

and drive about seven or eight blocks and return.

Q. At the time you went for your sandwich, did you take Dee's son with you and another boy?

A. That is right.

Q. Did you leave anybody at the office building when you left there?

A. I wasn't in there. I was talking to a customer at the time, at noon, about a few minutes before noon, and my son was—had the two boys, and he was going to take them to lunch, and I had this order, and I asked him if he would go in and write it up. It was a large order, and there was a lot of figuring to do and he could do it quicker than I could. He said, "Okay, if you'll take the boys."

Q. And then he went into the office section downstairs?

A. I imagine he did. I didn't see where he went.

Q. Do you know of anybody else who was in the building when you left for your lunch?

A. No, I do not. We always closed it up during the noon hour. [226]

Q. What time did this fire start?

A. I don't know. When I got back it was burning.

Q. You can't tell us the time the fire started?

A. No, sir, because I wasn't there.

Q. Didn't the fire start about 12 o'clock?

The Court: He has already said he doesn't know.

A. I was there at 12 and there was no fire.

(Testimony of Hyrum Jensen.)

Q. (By Mr. Castro): You have no knowledge as to the time the fire started?

Mr. Hilger: Asked and answered. Objection.

The Court: Sustained.

Q. (By Mr. Castro): I show you the original proof of loss. Didn't you put in it the fire started at 12 noon?

The Court: I will sustain the objection. The document speaks for itself.

Mr. Castro: I will offer the document into evidence.

The Court: Haven't you got it in already?

Mr. Hilger: The proof of loss I think is in or a photostatic copy is in already.

Mr. Castro: That does not correspond to this one, which is the original, your Honor.

The Court: Number 5 is supposed to be the proof of loss.

Mr. Castro: That does not correspond. The time [227] is left blank on that, whatever that photostat is.

Mr. Hilger: These are photostats.

Mr. Castro: I do not know, your Honor. That is why I am offering the original.

Mr. Hilger: We will stipulate the original says about 12 o'clock noon.

The Court: The photostat is not a correct photostat.

Mr. Hilger: Apparently it is not.

Mr. Castro: That is why I am offering the original.

(Testimony of Hyrum Jensen.)

Mr. Hilger: I am going to withdraw my stipulation. This is a photostat of that as it was sent in, and it did not have that notation on it. They can explain how that appears.

Mr. Castro: I am not going to explain anything.

Mr. Hilger: It is typed in. Anyone can type it in. I will withdraw my stipulation.

The Court: You have something queer about this. Obviously this is a photostatic copy. Where did you get this from?

Mr. Hilger: I think I got it from the copy of the complaint that was filed. It was one that was used for identification in a deposition that is to be read for the purpose of value as to the items contained therein.

The Court: This is not a photostat that you had? Is this a photostat that was furnished to you?

Mr. Hilger: It was made probably by our office, [228] your Honor. I think I took it off a retained copy of a complaint.

The Court: Apparently it is not a photostat of the one Mr. Castro is producing, because this one has the signature of Mr. Jensen on it and the signature of the Notary Public, and this one has it typed in. They are apparently two different copies.

Mr. Hilger: The photostat is a conformed copy with the signature of the notary typed in.

The Court: Have you seen this original?

Mr. Hilger: It would have emanated out of our office, so I guess I would have had to see it.

The Court: Do you want the original?

(Testimony of Hyrum Jensen.)

Mr. Castro: Yes, I do.

The Court: Put them both in. Make the one that has already been marked 5A and make the original, so we will have them together, 5B, Mr. Clerk.

Mr. Hilger: We do not mind them going in as a Plaintiff's exhibit.

Mr. Castro: We will offer the original as our exhibit, your Honor.

The Court: You would rather have the original marked as your exhibit?

Mr. Castro: Yes, your Honor, since there is a question about it.

(The original proof of loss was thereupon [229] received in evidence and marked Defendant's Exhibit K.)

Q. (By Mr. Castro): Mr. Jensen, where did you get the information that the fire occurred at about 12 noon?

A. I don't know where I got it. I probably answered it was around noon when the fire started.

Mr. Castro: Those are all the questions I have at this time, your Honor, reserving the matters which you suggested.

The Court: Very well. We will take the afternoon recess at this time.

(Recess.)

Redirect Examination

Q. (By Mr. Hilger): Mr. Jensen, in relation to the redwood moldings, what were your sources of supply for the material out of which you manufactured that product before the fire?

(Testimony of Hyrum Jensen.)

A. Well, we had bought about 70,000 board feet of Anzac.

Q. From whom had you purchased that?

A. Eureka Lumber Company—pardon me.

Q. The Eureka——

A. The Eureka Redwood Company.

Q. Eureka Redwood Lumber Company. That is the one that is now owned by Simpson?

A. Yes.

Q. That is one of the sources you had previously mentioned. Did you have any sources of supply for your raw material? [230]

A. Yes, we had.

Q. What were those sources?

A. We had much redwood in there.

Q. Where had you obtained it?

A. We had obtained it from Van der Fals, Eureka Redwood, Holmes Eureka, a number of places. I don't recall all of them.

Q. Had you bought any from Hammond Lumber Company? A. Yes, we did.

Q. Have you purchased any from Arcata Lumber Company?

A. We bought from Arcata Redwood.

Q. This type of product that you bought would not be the type of merchandise your supplier would sell in its state at the time of your purchase in its business; it was a scrap product, is that a fair statement?

A. Yes, we had to work it over.

Q. It was your function to remanufacture it into

(Testimony of Hyrum Jensen.)

other products of standard quality? A. Yes.

Q. At the time, however, that you bought it, it would have been considered a scrap product of the company from which you purchased it?

A. It wouldn't be considered as scrap, but it would be considered as a lower grade than they put on their product.

Q. A lower grade than they put—

A. A lower grade than they put on the market. [231] They sold nothing but number 1 stuff as a rule.

Q. After you manufactured it or applied your function to it, was it then a standard quality product? A. Yes, it was.

Q. You have referred to a purchase of Anzac, 70,000 board feet. What is Anzac?

A. That is 1x6, 8, or whatever it may be, sawed in two, and after it is sawed in two, it is still measured at that time as a full inch, and by sawing it in two, you double your footage. Instead of one foot you make two feet out of it.

Q. That is for the purpose of computing the scale? A. That is the purpose.

Q. First of all, Mr. Jensen, is it redwood, fir, or what is it? A. It was redwood.

Q. Is it kiln-dried product? A. Yes.

Q. Is it the type of thing that they put on the side of a house and they call it Anzac siding?

A. That is right.

Q. That is made ordinarily out of the top-quality redwood?

(Testimony of Hyrum Jensen.)

A. That is the very top quality of redwood. It must be a vertical grain and kiln-dried.

Q. By vertical grain what do you mean?

A. Well, vertical grain is the grain that stands [232] straight up in a piece of wood. Flat grain is one that is cut so that the grain runs flat.

Q. The vertical grain, only the edges of the grain would show on the face of the board?

A. That is right. If it is vertical grain, it only shows——

Q. I direct your attention to that piece of plywood behind you there. Is that an illustration of vertical grain or not?

A. That is not. That is what we call flat grain.

Q. It has the waves and figures through it?

A. Yes. This could be vertical grain more or less. It is a rough piece, but it is second growth of lumber.

Q. In order to obtain vertical grain lumber does it have to be specially cut in order to produce that?

A. Yes, it has to be put on your carriage and sawed so that your saw runs through the grain straight up and down instead of laying down. If it was laying down flat, it was a cheaper grade.

Q. The vertical grain lumber is the more expensive type? A. Yes, it is.

Q. Do you recall a specific purchase of that material from Eureka prior to the fire?

A. Well, we bought, ever since we have been in the business, practically all the factory outlet that they had at the Eureka Redwood, and we also

(Testimony of Hyrum Jensen.)

bought a considerable amount of green that we were stacking in our yard, and at our leisure time [233] we would run it through our edger and make 1x1's or whatever our orders called for to make, small moldings.

Q. I have reference now to the Anzac. Do you recall whether you purchased that from the Eureka Redwood Company?

A. Yes, we bought that from a very good friend of ours that was rather new in the business over there, and he was a very good friend of my son Dee's, and he made us a special price on it. He was going to give it to us but finally he said, "Oh, better give me \$10 a thousand." So we paid him \$10 a thousand. We paid it to him in cash. It wasn't run through the books or nothing.

Q. You have no knowledge——

A. Well, I take that back. I will say I have no knowledge.

Q. How much was involved in that purchase, Mr. Jensen?

A. It was about 70,000 board feet.

Q. And that was this Anzac type of material?

A. That was before it was split.

Q. Did you then remanufacture that into redwood molding products?

A. Yes, we did. We would cut off the poor sides, resaw some of it, and cut out a piece that was sawed crooked. The planer would drop down too far in one place on a long piece, and we would trim out the bad parts and use it in a shorter length.

(Testimony of Hyrum Jensen.)

Q. Reference has been made to "per thousand feet," and so [234] forth, and reference is made to the 66,000 board feet or board measure of redwood moldings involved in this fire. What is a board foot?

A. That is 1x1 by a foot square, twelve feet square or twelve inches square.

Q. In other words, a board foot is twelve inches by twelve inches by one inch thick?

A. That is right.

Q. And there would be on that basis twelve board feet and one cubic foot?

A. That is right.

Q. Does that measure or scale apply to the rough material out of which the finished products are made?

A. Yes, it does.

Q. If you should take a one-inch big board and dress it down or manufacture it down to a product that was a half inch thick, how would its thickness be computed for the purpose of determining board measure of the finished product?

A. It would tally the same as a full inch.

Q. In other words, a half-inch piece of material would be counted as finished material as full inch?

A. That is right.

Q. So that after the product was finished on the molding or other items, there would be more than twelve board feet per cubic foot? [235]

A. There would be just double?

Q. Around 24—— A. Instead of 12.

Q. Twenty-four board feet per cubic foot?

A. That is right.

(Testimony of Hyrum Jensen.)

Q. Mr. Jensen, you had in the course of the operation of your business various vehicles and machinery that you operated? A. We did.

Q. And those required fuel, I presume?

A. Yes, sir.

Q. Diesel fuel and gasoline?

A. That is right.

Q. Was it your practice to store that fuel supply on your premises at Third & Commercial?

A. Yes, it was. We had a bucket of fuel for washing tools, and so on, that set in by the work bench that we had there, probably half full of diesel, and we had other things that had grease or oil in it.

Q. Reference has been made to a drum of gasoline that was stored in there. Did you observe that drum of gasoline after the fire?

A. Yes, I did.

Q. Was the gasoline still in it?

A. Yes, it was.

Q. It had not been consumed by nor involved in the fire? [236]

A. No, it didn't. There was still gasoline in it.

Q. Reference has been made to 12 doors that were taken by a representative of Rice Supply Company after the fire. Was that person Paul Henning who took those doors? A. Yes, it was.

Q. Let me lead you along here so we can get through quicker. How long after the fire were those taken by Mr. Henning, do you recall?

(Testimony of Hyrum Jensen.)

A. I think it was two or three days after the fire.

Q. Was any charge made for those doors?

A. No, there was not.

Q. What was the reason for that?

A. Well, there was some doors and I had asked one of the firemen, Mr. McBeth, if it would be okay if I let him have them. And he said, "Go ahead."

Q. Were any of these doors that were taken by Mr. Henning included in the inventory attached to your proof of loss?

A. No, they were not.

Q. They were removed from the premises?

A. Yes.

Q. And you make no claim for those doors of any sort or character?

A. No.

Q. Reference has been made to certain property in Utah that was in your wife's name. Was it your practice and habit [237] of your wife to execute along with you all notes for money borrowed from the bank from time to time?

A. Yes, it was in California.

Q. She was a co-signer on all of these notes?

A. Yes, she was.

Mr. Hilger: That is all the questions I have at this time. I would like the Court to take judicial notice that an attachment is a procedure that issues prior to any judgment or determination of the controversy out of which the writ issues, inasmuch as reference has been made to attachments. Would the Court take judicial notice that an attachment is a remedy or a proceeding that issues prior to any

(Testimony of Hyrum Jensen.)

determination of the rights and merits of the controversy?

The Court: Of course, I know that. I have been at this game for almost or over 40 years. But what is it you want me to do about it?

Mr. Hilger: Take judicial notice of it so it might be considered in evidence for further comment at a later time in connection with the summation of this matter.

The Court: Are you referring to a question some other counsel asked about an attachment on a bank account?

Mr. Hilger: It has been established an attachment was levied against the account of the Eureka Lumber Company. I wish the record to show that an attachment is a remedy taken up before there is any decision on the merits of the controversy.

The Court: Do you want me to tell the Jury now? [238]

Mr. Hilger: I would appreciate if such notice were given.

The Court: I have judicial notice of it, but the Jury hasn't got jury notice of it, I suppose. What counsel is referring to, Ladies and Gentlemen, is that when somebody sues somebody else and claims they owe them money, they have an attachment issued against them and tie up their money. It is a preliminary proceeding and does not mean the man owes the money sued for or that he is going to get judgment. That question is decided at a later time in a court proceeding as to whether judgment will

(Testimony of Hyrum Jensen.)

be obtained. But this is a preliminary way of tying up somebody's money who you think owes you money. Is there any recross examination?

Mr. Castro: Just a couple of questions, your Honor.

Recross Examination

Q. (By Mr. Castro): Mr. Jensen, this Anzac, the redwood material, amounted to 70,000 board feet? A. Yes, sir.

Q. When did you receive the Anzac material?

A. When we first opened up the place of business, within six months, I would say, in 1954 or late 1953, I think, whenever we first took on the business.

Q. 1953 to 1954, and you paid \$10 a thousand for that material? [239]

A. That is right.

Q. Did that represent what was the 66,000 board feet that you are claiming?

A. That was included in the remanufacturing and sawed up into smaller pieces.

Q. How much of that 66,000 board feet is represented by that Anzac?

A. Well, I couldn't say. Not too much of it.

Mr. Castro: I have no further questions, your Honor.

Mr. Hilger: I have no questions.

The Court: You may step down.

Mr. Castro: Your Honor, I would ask to put a witness on out of order. He is here from Eureka.

He has come here from his private operated business.

Mr. Hilger: We have no objection to his appearing at this time.

Mr. Castro: That is why I brought it up. Mr. Musser, will you come up, please. [240]

PERCY L. MUSSER

was called as a witness on behalf of the Defendant, being first duly sworn testified as follows:

Q. (By the Court): Please state your name to the Court and to the Jury.

A. Percy L. Musser.

Direct Examination

Q. (By Mr. Castro): Where do you make your home, Mr. Musser?

A. On the outskirts of Eureka.

Q. How long have you lived in the Eureka area?

A. Since 1915.

Q. What is your business there?

A. Motor transportation broker.

Q. Do you have an office in Eureka?

A. I have an office on the corner of Third & Broadway.

Q. Are you acquainted with the Eureka Lumber Company? A. I am. I used to work for them.

Q. In June of 1956 was your office about a block away from the Eureka Lumber Company?

A. My office is located on the southeast corner of Third and Broadway. The Eureka Lumber Company's office is on the northwest corner of Com-

(Testimony of Percy L. Musser.)

mercial & Third Street with no obstructing views in between.

Q. Looking at this diagram which is on the board, Exhibit A, [241] this represents Commercial Street? A. Right.

Q. This represents Third Street?

A. Right.

Q. This represents the Eureka Lumber Company building. Now, if we went to the west or the left of that diagram to the other end of the block——

A. You would be on Broadway.

Q. You would be on Broadway, and your office is right on the corner of Broadway & Third Street?

A. Right.

Q. I show you an exhibit in the case, Defendant's Exhibit C. Are you able to identify your office in that particular photograph?

A. Yes, it shows on the corner.

Q. Would you put an X over your office?

A. (The witness indicated.)

Mr. Castro: May we mark that as X-1, your Honor, representing the office building of Mr. Musser, Exhibit C.

Q. Were you at your office on the day of the fire at the Eureka Lumber Company?

A. I was, yes.

Q. What time had you gone to work that day?

A. Approximately 6:30 in the morning.

Q. Did you remain at your office up to the time of the fire? [242]

(Testimony of Percy L. Musser.)

A. I was in my office at the time of the fire.

Q. Are you acquainted with Harold Dee Jensen?

A. Very much.

Q. Are you acquainted with Hyrum Jensen?

A. Yes.

Q. What was your first knowledge that anything unusual was taking place in the neighborhood on that day?

A. You mean at the time of the fire?

Q. Yes.

A. Well, prior to the fire I had two truck drivers that drove for Young's Commercial Transfer from Modesto in the office. I was getting ready to make a telephone call to Diebolt Lumber Company in Smith River, and we heard the explosion and I said to the boys, I said, "Gee, there——"

The Court: He doesn't want conversation, but just relate the things that took place without relating the conversation.

The Witness: I am going to tell you what happened.

The Court: No, no.

The Witness: I can't do that?

The Court: You are not going to tell anything. You just answer questions the way he asks you.

Q. (By Mr. Castro): Just tell what happened.

The Court: You heard an explosion. Go ahead. Ask the next question. [243]

Q. (By Mr. Castro): What occurred after you heard the explosion?

A. I looked around and I couldn't see anything.

(Testimony of Percy L. Musser.)

Q. Did you see Harold Dee Jensen after you heard that explosion?

A. Very shortly after he drove up in front of my office, yes.

Q. What was he driving in?

A. He was driving a GMC pickup that belonged to the Eureka Lumber Company.

Q. From what direction was he coming?

A. He was coming west on Third Street, and crossed over in front of my office.

Q. Would that be from the direction of the Eureka Lumber Company? A. It would, yes.

Q. And your office would be approximately 150 feet from the Eureka Lumber Company?

A. It would be approximately 300 feet.

Q. About 300 feet? A. Right.

Q. Would you describe the rate of travel at which you observed Mr. Harold Dee Jensen driving as he came by there?

A. When I sat in my office, my back was to the Eureka Lumber Company at that time, the way I was sitting in the office, [244] and I noticed him come up by the side window on the Third Street side of my office, and he was going very fast, and he came to a sudden stop right in front of the door.

Q. Is there a curb in front of your office?

Q. There isn't a curbing. I have poured cement there, because before I put the office there, there was quite a mudhole.

Q. Did his pickup come in contact with that area in which you had poured cement?

(Testimony of Percy L. Musser.)

A. He drove right across the top of it.

Q. Did he change his speed when he came across the top of that cement?

A. He came to a sudden stop in front of the door.

Q. Then what took place?

A. He opened the door like he was going to get out about a foot, I would say. And I was on the telephone, and he closed the door. And he must have shoved the foot throttle down to the floorboard and took off.

Q. Would you describe the rate of speed as he continued on?

A. The rate of speed wasn't very great, but the tires was sure going around.

Q. After that occurred did you hear any fire alarm sounded? A. No, I did not.

Q. After that occurred did you see that the Eureka Lumber Company building was on fire?

A. Well, I said, "What was Jensen looking for? Is the joint on fire?" [245]

The Court: That is not what he asked you. He asked you after the man drove off whether you saw the fire in the Eureka Lumber Company.

The Witness: That is what I was trying to explain to you, what I saw.

The Court: You can answer yes or no. That does not require any explanation. Either you saw a fire or you did not.

The Witness: I did see a fire.

The Court: That answers it.

(Testimony of Percy L. Musser.)

Q. (By Mr. Castro): Where was that fire, Mr. Musser?

A. On the north end of the building.

Q. On the north end of which building?

A. That building approximately in the center of it where the center wall goes through, right at the peak of the roof, because the roof is longer on one side than it is on the other.

Q. You are familiar with the Eureka Lumber Company building? A. I am.

Q. And you had been in that building prior to the fire on various occasions? A. Yes.

Q. I show you another photograph taken on August 10, 1956. Do you recognize that view?

A. Yes, I do.

Q. Is that a view from the general direction of [246] your office towards the Eureka Lumber Company? A. It is.

Q. Could you mark on that the portion of the roof where you saw the fire coming out?

A. (The witness indicated as requested.)

Mr. Castro: We will mark that Arabic number 1, your Honor, and offer the photograph in evidence as Defendant's exhibit next in order.

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit L.)

Q. (By Mr. Castro): Did you go over to see the fire or help fight the fire after you saw it was there? A. I did not.

Mr. Castro: May I show this photograph to the

(Testimony of Percy L. Musser.)

Jury, your Honor? Perhaps I had better pass the other photographs that showed the office.

The Court: Exhibit C.

Mr. Castro: Yes.

Q. Did you do anything with reference to calling the fire department after you saw that fire?

A. I did.

Q. What did you do?

A. What was the question?

The Court: What did you do.

A. I telephoned the fire department. [247]

Q. (By Mr. Castro): Then did you remain in your office? A. I did, yes.

Mr. Castro: Those are all the questions I have, your Honor.

Cross Examination

Q. (By Mr. Hilger): Mr. Musser, you did not see any smoke or fire until after you had seen Mr. Harold Dee Jensen, did you?

A. No, sir, I did not.

Q. Mr. Harold Dee Jensen stopped in front of your office, appeared to be alighting from his vehicle, opened the door, and then got back in, re-closed it and took off?

A. He didn't attempt to get out. He just opened the door, then closed it, and took off.

Q. You had not been over to the Eureka Lumber Company for some three months or so prior to the fire, had you? A. No.

Q. And that was because you and Mr. Harold

(Testimony of Percy L. Musser.)

Dee Jensen had had a controversy, isn't that right?

A. Yes.

Mr. Hilger: That is all.

Redirect Examination

Q. (By Mr. Castro): Mr. Musser, have you told anything but the truth here today? [248]

A. No, sir.

Mr. Castro: I have no further questions. That is the only witness I have at this time. He is under subpoena, so will you assure him he can go back?

Mr. Hilger: I will excuse him.

The Court: You may be excused, Mr. Musser.

Mr. Hilger: At this time the Plaintiff would read into evidence the

DEPOSITION OF EUGENE L. FOX

taken in Eureka, California, on September 19, 1957.
The questions were propounded by myself to the witness.

"By Mr. Hilger: Would you state your name, please? "A. Eugene L. Fox.

"Q. Where do you reside, Mr. Fox?

"A. 1511 County Lane in Eureka.

"Q. What is your profession?

"A. I am a Certified Public Accountant.

"Q. Where do you practice that profession?

"A. Well, I'm employed by David L. Moonie and Company.

"Q. Is that a firm of Certified Public Accountants? "A. Yes, it is.

(Deposition of Eugene L. Fox.)

"Q. Where do they have their offices?

"A. At 537 G Street, Eureka. [249]

"Q. How long have you been so engaged?

"A. Seven years.

"Q. Mr. Fox, in connection with your professional work did you have occasion to take an inventory at the Eureka Lumber Company?

"A. I did.

"Q. Do you recall when that was done?

"A. It must have been about—I don't recall exactly, but it must have been about the end of July or the very first part of August.

"Q. Of what year? "A. Of '56.

"Q. Had there been a fire at the premises prior to your taking an inventory there? "A. Yes.

"Q. When you took this inventory did you make any written record of what you found?

"A. I did.

"Q. I hand you a sheaf of paper bearing the imprint of Eureka Lumber Company and in pencilled handwriting, the same being stapled together as one document and I'll ask you if that's the record that you prepared of your inventory that you have just referred to? "A. It is. [250]

"Q. Huh? "A. It is, yes.

"Q. That is your handwriting?

"A. Yes, it is."

Mr. Hilger: At this time I will ask that the handwritten inventory of Eugene L. Fox be offered as Plaintiff's next in order.

The Court: Any objection?

(Deposition of Eugene L. Fox.)

Mr. Castro: No objection.

The Court: Shall I remove it from the deposition?

Mr. Hilger: If you will.

(The inventory referred to was thereupon received in evidence and marked Plaintiff's Exhibit 19.)

"Q. In connection with your practice as a Certified Public Accountant are you often called upon to officiate at and to supervise the taking of inventory? "A. I am.

"Q. Is the taking of physical inventories generally accepted audit practice leading to the certification of a financial statement?

"The Witness: The observation of the physical inventory is standard auditing procedure. We don't always take them, but sometimes we assist or supervise, as you stated, yes. [251]

"Mr. Hilger: Now in connection with taking this particular inventory, Mr. Fox, what procedure did you follow and what did you do?

"A. I observed the inventory and actually participated in the count and made a report of the count which I am holding in my hand.

"Mr. Fox, I am handing you here a photostatic copy of a proof of loss that has been marked as plaintiff's exhibit number one in connection with the deposition of Mr. Whittet in this proceeding here, (Plaintiff's Exhibit No. 5 in this proceeding) and referring to exhibit A attached thereto, the first five pages of Exhibit A, have you compared

(Deposition of Eugene L. Fox.)

the items reflected in that list with the inventory record exhibit one with your deposition here, your handwritten inventory? “A. I have.

“Q. Is the list on exhibit A there at which you are looking, pages one through five, is that an accurate tabulation of the handwritten inventory which you prepared?

“Mr. Castro: The items of inventory?

“Mr. Hilger: Of the items, we are not referring to price now, Mr. Fox, the items and the quantity of items, is that an accurate [252] tabulation of the items and quantity of items reflected in your handwritten inventory?

“A. Substantially, yes. There are two items, one of which I can't find on my handwritten inventory.

“Q. Which item is that, Mr. Fox?

“A. Two Venta Wall Windows, two by two display unit which is fifty-four dollars.

“Q. That does not appear on your handwritten inventory?

“A. I couldn't find it there, no.

“Q. Is there any other difference respecting the listing there in exhibit A, pages one through five, which does not correlate accurately with the handwritten inventory that you prepared?

“A. Yes. On page three there is an item twenty-two pints Griffin Mark-A-Way Creme. According to my inventory I had twenty-six, so, in effect, this is understated.

“Q. You mean that exhibit A at which you are

(Deposition of Eugene L. Fox.)

looking at page three understates the quantity compared to your handwritten inventory?

“A. Yes.

“Q. Now is there any other respect in which exhibit A, pages one through five, does not [253] correlate accurately with your handwritten inventory?

“A. No, it appears to be accurate with those exceptions.

“Q. Well, it's exhibit A attached to exhibit one for the clarification of the record. And that's exhibit one with the deposition of Mr. Whittet.

“Now can you describe the condition of the items listed in pages one through five of exhibit A attached to the exhibit one to the deposition of Mr. Whittet at the time you took the inventory?

“A. They were badly smoked and in some cases they were damaged by water also. I think that pretty well covers it. Some of the sheet rock that is listed on page two was worthless, you might say, from the heat and everything. It was—especially around the edges, it was just about ready to fall apart. We were able to count it, but other than that, it was a loss.

“Q. Were any of the items partially burned?

“A. I don't believe the items listed here were, no.”

The Court: Do you wish to read the cross examination?

Mr. Castro: Just three or four lines is all I have an interest in, your Honor. [254]

(Deposition of Eugene L. Fox.)

“Q. (By Mr. Castro): What were you to get? Were you to get the value of the inventory, the condition of the inventory or the quantity of the inventory? • “The quantity.

“Q. Was that the only item you were to get?

“A. Yes.”

That is all I care to read.

Mr. Hilger: That is all we will read from the deposition of Mr. Fox, and at this time I would like to begin the reading of the deposition of Harold Dee Jensen taken in San Francisco, California, on May 11, 1957.

The Court: Is the original on file?

Mr. Hilger: I don't know. It was taken by Mr. Castro at his request. The witness is now dead and it constitutes the only method of obtaining his testimony in this proceeding.

The Court: Where is the original? Does anyone know?

Mr. Castro: No, your Honor. The reporters were Gagan & McDaniels here in San Francisco. We can certainly check with them.

The Court: Do you have a copy?

Mr. Castro: I have a copy.

The Court: Is there any objection to counsel using a copy then? [255]

Mr. Castro: No, not as to the accuracy of it, your Honor, but if there are other depositions to be read, may this be deferred until the morning? There are certain matters I think we can anticipate.

The Court: Is that possible in the preparation of your case, to take up something else now before you take up this deposition?

Mr. Hilger: Surely. We will read the deposition of Mr. H. B. Whittet taken in Eureka, California, on September 9th. I believe we can finish this one by 4:00 o'clock.

“H. B. WHITTET

“a witness, being of lawful age, and being first duly sworn in the above cause, testified on his oath as follows:

“By Mr. Hilger: State your full name, please?

“A. H. B. Whittet.

“Q. And where do you reside, Mr. Whittet?

“A. At 306 West Pratt Street in Eureka.

“Q. What is your business or occupation?

“A. Salesman.

“Q. And by whom are you employed?

“A. Western Door and Sash Company, Fifth and Cypress Streets, Oakland.

“Q. How long have you been so employed?

“A. Over five years. [256]

“Q. What territory do you cover in connection with your duties with Western Door and Sash?

“A. From Garberville, California, to Gold Beach, Oregon.

“Q. In connection with the performance of your duties have you had occasion to deal with the Eureka Lumber Company? “A. Yes.

“Q. And what have been those dealings, Mr. Whittet, from a period through 1955 and up to June of 1956?

(Deposition of H. B. Whittet.)

“A. My dealings with them have been in selling them doors and sash and windows, moldings, frames and related items.

“Q. Did you call upon their place of business in connection with your duties? “A. Yes.

“Q. And upon the occasion of those calls did you have opportunity to observe their inventory of your merchandise? “A. Yes.

“Q. Did you have occasion from, say, May or June of 1956 to be upon their premises and look at their inventory?

“A. May or June of '56? [257]

“Q. To refresh your recollection, the fire occurred there on June 25th.

“A. Yes, I would have been there during that period, definitely, uh huh.

“Mr. Hilger: Mr. Whittet, I'll show you a photostatic copy of a proof of loss referring to Exhibit A attached thereto, the first page, the items thereon beginning at the top and down to but not including two Venta wall windows and ask you look that list over.

“A. All right.

“Q. Now referring to the items that are described therein on that list, how does that compare with the inventory you observed when you were on the premises just prior to the fire?

“A. Well, with the exception of——”

At that time an objection was interposed:

“Mr. Castro: Now, just a moment. He didn't say he was on there just prior to the fire, Counsel.

(Deposition of H. B. Whittet.)

He hasn't fixed any date when he was in there.

"Mr. Hilger: His testimony has been that he would have been there during May or June of '56; upon the occasion of that visit and your observation of the inventory how did—what is the [258] comparison between what you observed and the list that you have there before you?

"A. I would have to answer that this way. I don't recall distinctly of seeing all of these doors here, for instance, the ash doors, we have twenty-three two fours, that would be an abnormal stock of that size. I don't distinctly recall seeing those doors here or at their yard. However, this would be, I would say, approximately a normal stock with the exception of that excessive amount of that one size ash door.

"Q. Well, what I am trying to ascertain, Mr. Whittet, is the comparison between this list and your observation of the inventory upon the occasion of your visit, does it compare reasonably and accurately?

"In order to clear up any uncertainty or misunderstanding, upon the occasion of your visit to the Eureka Lumber Company in connection with your duties, did you observe their inventory of your stock or the stock that sold or handled?

"A. That's right. I did. That is common practice when you go into a place of business to observe the stock that they have, but to recall exactly what was in the stock at that time would be an impossibility. [259]

(Deposition of H. B. Whittet.)

“Q. Well, you have been shown a list there, Mr. Whittet. How does that list compare with your recollection of your observation of the inventory?

“If by reference to the list before you are able to state any comparison between that list and your recollection of actual observations of inventory, would you so state?

“What’s your best recollection of what was there, what items of merchandise?

“A. Well, to the best of my recollection, as I said in the beginning, with the exception of this—I recall the stock that they normally carried there. Insofar as I recall, it was about in proportion to about what it normally was which would be a fairly well rounded stock of mahogany doors, some sash, some door jambs, some other doors including one panel one light and French doors, but in precisely what quantity, I couldn’t say. We’ll state that their normal stock would run anywhere from fifty to one hundred doors be what they would normally carry.

“Q. Now in clarifying that answer, you were asked as to your recollection of your observations of their stock. By ‘normal’ do you mean that it was their average stock that they carried basically?

“To further pin that down, Mr. Whittet, are you referring to your visit that you have alluded to in May of ’56 or June of ’56? “A. Yes.

“Q. Now, then, Mr. Whittet, in connection with your duties as salesman for the Western Door and

(Deposition of H. B. Whittet.)

Sash, are you familiar with the prices of the merchandise carried by your firm?

“A. Yes, I am.

“Q. And you were familiar with those prices during the period of June of 1956?

“A. I was very familiar with them at that time. There have been some price changes, however, since then and I do not maintain the old price files. There are some that I can—that I can recall, but that could be very easily established what the price was at that time, definitely what they were.”

Beginning on page 11 at line 20:

“Q. Now, then, are you familiar as a result of your experience in the field of marketing door and sash with the market price and the general market for that type of product here in Humboldt County and Del Norte County? [261]

“A. Yes, I am.

“Q. And were you familiar with those prices and market values in June of 1956? “A. Yes.

“Q. All right. Mr. Whittet, would you give us your opinion as to the reasonable market value on a wholesale basis of the items previously referred to on page one of Exhibit A at June of 1956?

“Mr. Castro: You are talking about the total items from the top of the page down to the two Venta wall windows?

“Mr. Hilger: To but not including.

“The Witness: I would say that they are very nearly accurate.

(Deposition of H. B. Whittet.)

“Q. You mean the values set forth in Exhibit A?

“A. It would seem to me to be very fair and very close, very close. Each item would have to be checked accurately for me to say that it’s absolutely accurate, but certainly it’s very close.”

Mr. Castro: There are a few questions on cross examination I could read, your Honor. These are cross examination questions.

“Q. (By Mr. Castro): When were you first [262] contacted concerning appearing as a witness in this matter?”

Mr. Hilger: I will object as I did at the deposition, your Honor.

The Court: Is that the only question you objected to? I will overrule the objection.

“A. I don’t know what day it was.

“Q. Approximately?

“A. Let me think. I believe it was about ten days ago.

“Q. Who contacted you?

“A. Mr. H. M. Jensen.

“Q. And since that time have you been requested to produce any invoices of the Western Door and Cash Company? “A. No.

“Q. At any time from the fire of June 25th, 1956, up to the present time have you been requested by H. M. Jensen, Harold Dee Jensen, Counsel Fred Hilger to produce any Western Door and Sash invoices? “A. No.

(Deposition of H. B. Whittet.)

“Q. And your office is maintained here in the City of Eureka? “A. Yes. [263]

“Q. And it has been maintained here for approximately five years? “A. Right.”

Then at page 14, line 7.

Mr. Hilger: I would request the Court if the first part of that cross examination is to be used, the remaining beginning at page 13 about line 16 also be read.

Mr. Castro: Certainly. I will be happy to read it:

“Q. And your firm is listed in the telephone book, is it not?

“A. Yes. I beg your pardon there. The Western Door and Sash Company is not listed here in Eureka but I am.

“Q. You are listed?

“A. I am their agent.

“Q. You’re listed as agent for them?

“A. Not in the book, it’s not shown as agent for them, I’m not shown as agent for them.

“Q. And do you advertise as an agent or representative for the Western Door and Sash Company?

“A. You mean through the media of newspapers and such?

“Q. Or any other way? “A. No. [264]

“Q. How do people know that you’re in business here?

“A. Well, I call on them approximately once a week. It’s pretty hard for them to miss me.

(Deposition of H. B. Whittet.)

“Q. Now do you have a record of what you sold to the Eureka Lumber Company from 1956?

“A. No, I do not.

“Q. Would the Western Door and Sash Company have a record of what you sold to the Eureka Lumber Company during 1956? “A. Yes.

“Q. This morning I was handed a series of invoices of the Western Door and Sash Company consisting of one—seven invoices. Have you seen these invoices?

“A. I don’t know whether I have or not.

“Q. Would you look at them. Have you examined those invoices? “A. Yes.

“Q. For the purposes of the record, those invoices may be identified as invoices entitled date billed, February 14th, ’56, number 05073; invoice bearing date sold January 25th, 1956, being number 03567; invoice date sold one twenty-three fifty-six, number 03657; invoice date [255] one twenty-three fifty-six, being number 03678; invoice, same date being number 03656; invoice date sold December 28, 1955, being invoice number 01428; invoice twelve nineteen fifty-five, being invoice number 0702.

“You have examined each of those invoices?

“A. Uh huh.

“Q. Do you know of any other invoices?

“A. Yes.

“Q. And do you have any invoices in your records in your office?

(Deposition of H. B. Whittet.)

“A. No. I do not keep the invoices.

“Q. Are these true copies of the invoices from the Western Door and Sash Company?

“A. Yes.

“Q. On the face of the invoice is written fifty per cent. Did you notice that? “A. Yes.

“Q. What is the significance of that term fifty per cent?

“A. The price is based on what we term a wholesale list price which appears in our catalog and fifty per cent is the discount to the dealer, our customer.”

Mr. Castro: I would like to offer in evidence [266] in the morning the invoices referred to in this examination with our accountant, Mr. Stearns, who is going over them.

The Court: Very well.

Mr. Castro: Page 17, line 8:

“Q. On this last occasion that you were there before the fire in May or June of 1956, where did you go? “A. I don’t recall exactly.

“Q. Did you see anybody on that occasion?

“A. I don’t recall that.

“Q. Did you take an order on that occasion?

“A. I don’t recall that either.

“Q. At any time did you take any inventory at the Eureka Lumber Company in 1956?

“A. No, no.

“Q. Did you go to the Eureka Lumber Company following the fire of June 25th, 1956?

(Deposition of H. B. Whittet.)

“A. No.

“Q. Did you have—strike that. Was there an outstanding account of either payable or receivable between Western Door and Sash Company and the Eureka Lumber Company in June of 1956?

“A. Yes.

“Q. And in what amount?

“A. I don’t recall exactly. I believe it was [267] eight hundred and some dollars.

“Q. And who would have the record of that account?

“A. Western Door and Sash Company.”

Mr. Hilger: The redirect examination by Mr. Hilger:

“Q. Having reference to the invoices that have been referred to here, I believe the date of the first one is December 19th, 1955. Do you recall whether or not at that date or upon the occasion of that purchase or, I’ll state it this way, just prior to that purchase was there any then existing inventory of your merchandise in the Eureka Lumber Company? “A. Yes, there was, yes.

“Q. That was prior to the purchases reflected in these invoices? “A. Right.”

Mr. Castro: Will you read the question and answer by me there?

Mr. Hilger: Yes. On further recross Mr. Castro asks, “Do you know the amount of the existing inventory in December of 1955? “A. No.”

The Court: It is warm in here. We try to get

some kind of cooling here when we get humid days. [268] There are some fans, but like some other Government equipment, they don't seem to work. I am explaining this to you because I notice some of you look as if you need some fresh air. If we open the windows we get noise from the street. Many years ago when this addition was built the Government's architect, who was in Washington, designed a very beautiful courtroom, as you can see, but he apparently had no practical experience, and so he designed the courtroom on the outside of the building instead of the inside of the building, as a result of which we get all the noise and we can't open the windows to get fresh air in. However, we get used to it. Will you come back tomorrow morning at 10:00 o'clock, please.

(Whereupon, an adjournment was taken until September 26, 1957, at 10:00 o'clock a.m.) [269]

Thursday, September 26, 1957—10:00 O'Clock A.M.

The Clerk: Jensen vs. Boston Insurance Company for further trial.

Mr. Hilger: Ready for the Plaintiff.

Mr. Castro: Ready for the Defendant.

Mr. Hilger: At this time, your Honor, the Plaintiff would read into evidence the deposition of Harold Dee Jensen taken on May 11, 1957. On that occasion in San Francisco the questioning was by Mr. Castro of Mr. Harold Dee Jensen, the witness.

"HAROLD DEE JENSEN

"called as a witness by the defendant and third party plaintiff, Boston Insurance Company, being first duly sworn by the notary public to tell the truth, the whole truth, and nothing but the truth, testified as follows:

"Examination

"Q. (By Mr. Castro): Would you state your name in full, Mr. Jensen?

"A. Harold Dee Jensen.

"Q. And what is your age? "A. 37.

"Q. Are you married or single?

"A. Single. [270]

"Q. Have you been known by any other name?

"A. No.

"Q. Haven't used any other name?

"A. No.

"Q. Either your first name or family name?

"A. No.

"Q. Where do you reside, or live, at the present time? "A. 2434 E Street, Eureka.

"Q. And how long have you made your home at that location?

"A. Oh, approximately a year.

"Q. When did you first come to live in Eureka?

"A. Oh, '48 or '49, as near as I can recall.

"Q. And you have lived there continuously since that time? "A. Yes.

"Q. What is your occupation?

"A. I am selling lumber right now.

"Q. How long have you followed that work?

"A. Oh, when I first started in, about 1942,

(Deposition of Harold Dee Jensen.)

when I first started in the lumber business; some has been manufacture, some selling, some hauling.

“Q. And are you self-employed, or are you working for some outfit?

“A. Self-employed right now.

“Q. How long have you been self-employed?

“A. Oh, about the last two months. [271]

“Q. Whom did you last work for?

“A. Eureka Lumber Company.

“Q. And when did you start to work for the Eureka Lumber Company?

“A. I couldn't say right offhand. I think I worked for about six months when Cable had it, and then I worked continuously up until the time of the fire, and partly after the fire, when the Eureka Lumber Company had it.

“Q. Who was Cable?

“A. He was in the Eureka Lumber Company.

“Q. What is his first name or initial?

“A. Well, I think it was a corporation. I think it was Alert Lumber Company, Incorporated.

“Q. Where is your office at the present time?

“A. I am using two different offices; I am using one at 8343 Clarence in San Gabriel and 2434 E Street, Eureka. They are both just home phones.

“Q. Now, since '42, have you followed any line of work other than the lumber business?

“A. No.

“Q. Have you been in the production end of lumber? “A. Yes.

“Q. And when was that?

(Deposition of Harold Dee Jensen.)

"A. Oh, in '42—I can't recall exact dates, but it's been intermittent since '42 until, I think, '53 was the last. [272]

"Q. And where did you last engage in the production of lumber? "A. Eureka.

"Q. Were you self-employed or working for someone else at that time?

"A. The last I was working for someone.

"Q. And who was that?

"A. Alert Lumber Company. They were going under the Eureka Lumber Company; that's a subsidiary of the Alert.

"Q. Are you related to Hyrum Jensen?

"A. Yes.

"Q. And what is your relationship?

"A. He is my father.

"Q. Did you ever operate a mill for your father?

"A. I leased one from him.

"Q. Where was it located?

"A. On the Ole Hansen Road.

"Q. Where is that road located?

"A. Oh, it's between Arcata and Eureka.

"Q. And what was the name of the mill?

"A. Sequoia Lumber Company.

"Q. Who was the owner of the mill?

"A. H. M. Jensen.

"Q. And who was the owner of the equipment?

"A. H. M. Jensen. [273]

"Q. Was that a written agreement or an oral agreement? "A. Written agreement.

(Deposition of Harold Dee Jensen.)

“Q. Do you have the original written agreement or a copy of it? “A. Not now I don’t.

“Q. Did you have the original agreement or a copy of it? “A. You say did I have?

“Q. Yes. “A. Yes.

“Q. What became of your document?

“A. I don’t know. I think it was in the fire.

“Q. Which fire do you refer to?

“A. The one of the Eureka Lumber Company.

“Q. Is it the fire of June 25, 1956?

“A. Yes, that’s right.

“Q. During what period did you have the lease agreement with Hyrum Jensen?

“A. I can’t recall that offhand.

“Q. Tell me approximately.

“A. I think it was between ’51 and ’53, approximately.

“Q. Now, did you have any other lease agreements with Hyrum Jensen?

“A. No, not that I recall.

“Q. That is the only one you have had with him? “A. Yes. [274]

“Q. Have you had any employers other than the Eureka Lumber Company, in the last five years?

“A. Yes.

“Q. Who?

“A. Let’s see, five years—no, not within the last five years.

“Q. That would take you back to a period of about 1952.

“A. Yes. I haven’t had any since then.

(Deposition of Harold Dee Jensen.)

“Q. When did you first become acquainted with King Cable?

“A. I think about in 1951, approximately.

“Q. And did you have any business relations with him thereafter? “A. Yes.

“Q. What was your first business relation?

“A. Sold him lumber.

“Q. And was that as a salesman, or was that as operating the mill?

“A. I can't remember. I have to go to the records on that to make certain.

“Q. Do you have records to reflect that situation? “A. Not now.

“Q. What has become of them?

“A. They were destroyed in the same fire.

“Q. That is the fire of June 25, 1956?

“A. Right. [275]

“Q. What other business relationship did you have with Mr. Cable, apart from selling some lumber?

“A. Oh, borrowed money from him. I had a contract for him to purchase all the lumber from Sequoia Lumber Company.

“Q. And as far as the date of this fire, June 25, 1956, did you have any business relationship with Mr. Cable? “A. No.

“Q. Had you repaid the moneys which he had loaned you? “A. Yes.

“Q. And was there any contract in existence for the purchase of lumber by Mr. Cable?

“A. No.

(Deposition of Harold Dee Jensen.)

“Q. When did that terminate?

“A. I’d have to check the records there, too, which I don’t have. I don’t know.

“Q. What record do you refer to?

“A. I’d have to check the contract. The fact is, it is on file, I am sure, in the courthouse in Eureka.

“Q. Where?

“A. The Recorder’s Office or where——

“Mr. Hilger: I would like to observe for the record that all of those contracts, leases, purchases and other documents relating to their transactions between Alert Lumber Company are on record in the Recorder’s office in Humboldt County. [276]

“Q. (By Mr. Castro): Following the fire of June 25, 1956, did you receive a letter addressed to you requesting you to appear for examination under oath in Eureka? “A. I did not.

“Q. Were you advised by Hyrum Jensen that such a letter had been written to him and to you?

“A. He said one had been written to him, but not to me.

“Q. And who told you it had been written to him, but not to you?

“A. He did. He didn’t say that it hadn’t been written to me; he just said that he had one. There was no mention whatever.

“Q. Did you see that letter?

“A. No, I didn’t.

“Q. Did he show it to you? “A. No.

“Q. And did you have any other discussion with him on that subject? “A. No.

(Deposition of Harold Dee Jensen.)

“Q. Did he tell you about receiving the letter prior to the examination under oath taking place?

“A. I don’t remember.

“Mr. Hilger: What letter are we referring to, and when? Is it the same letter about which your previous question was directed? [277]

“Mr. Castro: That is correct.

“Mr. Hilger: Objected to as asked and answered.

“Q. (By Mr. Castro): Your answer is you don’t know? “A. Yes.

“Q. On the morning of October 12, 1956, did you see Hyrum Jensen in the city of Eureka?

“A. I couldn’t say.

“Q. Where were you living at that time?

“A. 2434 E Street.

“Q. Is that the home of Hyrum Jensen?

“A. Yes.

“Q. How long have you made your home at that location?

“A. Well, from the time he moved in there. I don’t know the exact dates on it.

“Q. And you were living there on October 12, 1956, weren’t you?

“A. Yes, but I couldn’t say whether I was home or whether I was out on a truck, or I was completely out of the town or not; I don’t know.

“Q. What was your employment at that time?

“A. October? I didn’t have any at that time.

“Q. How long had you been without employment?

“A. I had just been off—I had just been em-

(Deposition of Harold Dee Jensen.)

ployed off and on with something to do with the Eureka Lumber Company, which was fairly limited. [278]

“Q. For what period of time?

“A. From June until approximately two months ago.

“Q. On the morning of October 12, 1956, didn't you have a conversation with Hyrum Jensen concerning examination under oath that was to take place that morning in Eureka?

“A. I don't recall any October 12th. I could not place that date along with any other day. There was no significance.

“Q. Do you recall any conversation on that subject with Mr. Hyrum Jensen?

“A. No, I don't.

“Q. Did Mr. Hyrum Jensen ask you to attend an examination under oath on October 12, 1956?

“A. There was no conversation; he didn't ask me.

“Q. But you—strike that. Did you tell Hyrum Jensen that you would not attend the examination under oath? “A. I did not.

“Q. Have you ever been convicted of a felony?

“A. No.

“Mr. Castro: This morning we have asked for the production of certain documents. Have you brought any of those documents, counsel?

“Mr. Hill: No.

“Mr. Castro: Would you state if there is any reason for not producing them? [279]

(Deposition of Harold Dee Jensen.)

"Mr. Hill: Mr. Jensen informed me when I advised him of your request that he did not have the documents, or that the documents were destroyed in the fire of June 25, 1956. With particular reference to your demand, Mr. Castro, you asked for copies of his income tax returns for the years '51 through '57. Mr. Jensen informed me that those were in a foot locker; is that correct, Mr. Jensen?

"The Witness: That's right. 1957 is not due yet until May of next year.

"Mr. Hill: That's right. The same is true as to whatever books and records he would have regarding his own business. They were in the same place.

"Mr. Hilger: May I observe for the record that Mr. Stearns of Pete, Marwich & Mitchell went through all the available records down there, including various documents, personal records as well as personal business records, in my presence.

"Q. (By Mr. Castro): Now, did you make out a tax return for the United States Government in 1951? "A. Yes.

"Q. And for each of the calendar years of 1952 through 1956? "A. That's right.

"Q. Do you have a copy of your 1956 tax return? [280] "A. No, I don't, not now.

"Q. Where is it?

"A. Well, it was in the office desk. It was there after the fire, but it turned up missing.

"Q. Your 1956 tax return was destroyed in the fire? "A. No, it was not.

"Q. What became of it?

(Deposition of Harold Dee Jensen.)

“A. I don’t know.

“Q. Where was it the last time you saw it?

“A. In a desk drawer in my desk.

“Q. Where?

“A. In the Eureka Lumber Company building.

“Q. When was that?

“A. Four or five days after the fire.

“Q. Your 1956 tax return was not due until April 15, 1957. Had you made it out in 1956?

“A. Excuse me. That was a ’55 tax return I had reference to.

“Q. Do you have a copy of your 1956 tax return?”

The Court: Mr. Hilger, I do not like to interrupt you, but what has all that got to do with this case? I appreciate there have been some statements made by counsel, but I do not see the relationship of this examination to the claim of the plaintiff on this insurance policy.

Mr. Hilger: There has been certain issues raised in [281] the opening statement by the defendant. There have been facts testified to by a witness placed upon the stand by the defendant regarding the conduct of Harold Dee Jensen.

The Court: That may be material, yes, but his own income tax returns and what he did with his own documents, I do not see that that has anything to do with your case.

Mr. Hilger: I am quite in agreement that it is somewhat irrelevant. However, this witness is dead. This is the means by which he can testify. Out of

fairness to the trier of the fact here, it is difficult enough to follow a deposition at best, but if it is broken up in little segments and I read a part and Mr. Castro reads a part, it begins not to make sense, and in the interest of justice I would like to present the entire deposition as it relates to this policy. There are some few pages later on that refer to another matter which might be omitted. If this is not offered at this time, it will be offered later on.

The Court: Of course, the only thing the defendant has put in has been out of order because of the necessities, the circumstances at the time. But you can answer and read this deposition by way of rebuttal, if you wish, if it becomes necessary, but it is not clear to me at all how this is part of the plaintiff's case.

Mr. Hilger: It is not all part of the plaintiff's case, your Honor. I appreciate that. It is only as a matter of [282] trying to maintain some continuity here in the presentation of the testimony of Mr. Harold Dee Jensen that I read it. I can skip over to various portions that I have marked here that may be material.

The Court: Since I haven't it in front of me, it seems to me quite a lengthy deposition.

Mr. Hilger: It goes on forever, about two-and-a-half hours reading time, but, as I say, it is the only way we can get the testimony of Mr. Jensen before the Court. I did not appear for Mr. Harold Dee Jensen in the first instance. I now represent his estate, and in defense of Mr. Jensen——

The Court: I do not know that there is anything

so far in the record for him to defend himself against. That is why I am curious. I do not want to tell you how to present your case, and if you feel that it is essential at this time I do not feel that the Court should interpose itself against your wishes in that regard, but you are only putting on the plaintiff's case now, and there may or may not be any need to read this deposition, depending upon what the defendant has to offer. At the present time your affirmative case deals only with the proof of fire, the dollar amount of the loss, and I do not know why you have to spend this time in reading this long deposition simply because of some statements made by opposing counsel, until such time as it appears there is evidence concerning which this deposition might be properly rebuttable. I am not intending to foreclose [283] you in any way from reading this. I just do not see at the moment in the order of proof that there is any necessity for your reading it.

Mr. Hilger: It is the position of the plaintiff and also the third party defendant, the Estate of Harold Dee Jensen, that we present all the facts that are at all material regarding this matter. It is a difficult matter to go through this deposition and pick out the small part that is relevant but still have the matter be intelligible to the Jury.

The Court: I am not suggesting to you, and I do not want to take undue time in connection with it, that you pick out parts of it. If it has to do with the amount of the claim of the plaintiff that is involved, which you feel is proper corroborative evi-

dence, of course, that would be perfectly proper, but I do not think there is any need for you to read the deposition concerning the activities of this deceased son of the plaintiff at this point, merely because of the fact that some statements have been made by opposing counsel concerning it. I think you have a perfect right to present that at the appropriate time, and I am not intending in any way to shut you off in presenting it. I just do not see why we have to spend a couple of hours in going through this deposition at this time. That is all.

Mr. Hilger: I felt at the time the deposition was 90% irrelevant, and I do now, but I wanted to make a full disclosure and allow this dead person to speak as fully as can be [284] permitted.

The Court: If it becomes necessary and appropriate, you have the right to present that, Mr. Hilger, and I would not deprive you of that right. I just do not see how it is part of your affirmative case at this time.

Mr. Hilger: In view of the Court's remarks, I can and am prepared to read various other depositions and at the morning recess I will run through the deposition of Harold Dee Jensen to see what matters the Court might want to receive at this time.

The Court: I want to make it clear, so the record is clear, that there is reserved to you the right to present this deposition in full or in part at any appropriate time in the trial of the case.

Mr. Hilger: Thank you, your Honor.

At this time we would read into the record and

in evidence the deposition of Chester Franklin Brown, taken in Eureka, California, on September 19, 1957. [285]

“CHESTER FRANKLIN BROWN

“a witness, being of lawful age, and being first duly sworn in the above cause, testified on his oath as follows:

“Direct Examination”

“Q. (By Mr. Hilger): Would you state your name, please?

“A. Chester Franklin Brown.

“Q. Where do you reside, Mr. Brown?

“A. Residence or business?

“Q. Residence.

“A. Residence, Old Arcata Road, Eureka, Route 1.

“Q. And what is your business, Mr. Brown?

“A. Electrical contractor.

“Q. And where do you carry on that business?

“A. 52 West Fifth, Eureka, California.

“Q. How long have you been in that business?

“A. Approximately four years.

“Q. That's here in the City of Eureka?

“A. Yes, sir.

“Q. Have you had any electrical experience prior to establishing your business four years ago?

“A. Just twenty six years.

“Q. Huh?

“A. Twenty six years all told.

“Q. And you were engaged as an electrical contractor [286] in Humboldt County in the City of Eureka in June of 1956? “A. Yes, sir.

(Deposition of Chester Franklin Brown.)

“Q. As a result of your activity in that business and your experience in the electrical contracting field, are you familiar with the market value of electric motors in Humboldt County, in this area?

“A. I think so.

“Q. Were you familiar with the market price and fair market value of electric motors in June of 1956 in Humboldt County?

“A. I think so.

“Q. In your opinion, Mr. Brown, what would be the fair market value in June of 1956 in Humboldt County of one used twenty five horse power electric motor and one fifty horse power used electric motor?

“Mr. Castro: Just a moment. Would you identify them on the inventory, counsel, so we will know where you are?

“Mr. Hilger: Yes, I will. Looking at page five of exhibit A attached to exhibit one of the—— (The photostatic copy of the proof of loss.)

“Mr. Castro: (Int’g) I suggest that we get the witness’ independent statement concerning these items.

“Mr. Hilger: All right.

“Mr. Castro: For the purpose of the record so I can [287] follow you, I would like to know which items you are referring to.

“Mr. Hilger: Page five of exhibit A attached to exhibit one on the deposition of Whittet, approximately an inch and a half from the bottom of the list.

(Deposition of Chester Franklin Brown.)

“Mr. Castro: Eight or nine items from the bottom?

“Mr. Hilger: Right.

“Mr. Castro: I see.

“The Witness: Can I refer to some pamphlet on this?

“Mr. Hilger: Well, if you have an opinion based upon your experience in the field.

“The Witness: It would be impossible for me to quote you the price of the motor without first knowing, without looking it up, there's too much different types of motors and everything to trust my memory at the exact amount.

“Q. Well, we have the horse power, twenty five horse power and fifty horse power. “A. Yes.

“Q. And given an R.P.M. of twelve hundred R.P.M. and given a brand of General Electric.

“A. All motors for General Electric, any of the leading brand motors are the same price based on the National Price Book, and a fifty horse power motor is, I believe, approximately twelve hundred dollars retail, [288] the twelve hundred R.P.M.

“Mr. Castro: You're talking about a new motor?

“The Witness: That's what we——

“Mr. Castro: (Int'g) The question is a used motor, as I understand it.

“The Witness: We'd base our used motor on the price of a new one. I mean, not exactly the same, but we figure it fifty or seventy five or whatever degree the motor is valued at, a motor that is in good shape, a used motor will run approximately

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seventy five percent or a little better than the price of a new one. The price of the motor actually that's being used is no way decreased, the valuation of it.

"Mr. Hilger: What would be your opinion as to the value of a used General Electric twelve hundred R.P.M. horse power motor in June of 1956?

"A. Well, a free estimate, I'd say close to a thousand dollars.

"Mr. Castro: What do you mean by 'a free estimate'?

"A. I don't have any papers, what can I say?

"Mr. Hilger: Would you like to make a few computations and get out your paper and do so if you wish so and we can have an accurate statement of what your opinion of the value would be.

"A. My opinion of it is a thousand dollars."

Mr. Hilger: Do you wish to——

Mr. Castro: No, go right ahead.

"The Witness: May I clarify that?

"Mr. Hilger: If you can give us an opinion, Mr. Brown, of the value of the used motors.

"A. A motor that is——

"Q. (Int'g) Of the fifty horse power capacity, standard brand, twelve hundred R.P.M. in June of 1956?

"A. If the motor is runable it's approximately seventy five to ninety percent of the new value.

"Q. That would be the new value?

"A. Be around twelve hundred dollars.

"Q. In applying the same facts to a twenty five horse power motor, what would be your opinion as

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to the value of a twenty five horse power motor, the same description as the fifty, in June of 1956?

“A. New price on it is approximately eight hundred to eight hundred and fifty dollars.

“Q. And would the same percentage of new value hold true?

“A. Anything in multiple horse power is based on those basis. In dealing in used motors we find that that's what we have to gauge it from is we base it on the new prices and percentage of the use from the valuation of the motor which, if it's in use, it's [290] approximately as good as a new one. There is no such thing as a book price on a used motor.”

The Court: Do you wish to read the cross examination?

Mr. Castro: Yes, your Honor, if I may. This is the cross examination of the witness Brown on September 19th of this year.

“Q. (By Mr. Castro): You're familiar with the handling of new motors? “A. Yes, sir.

“Q. The purchase of them from wholesalers and as a retailer? “A. I am a retailer.

“Q. As a retailer when you purchase your new motor do you get a percentage off the retail price?

“A. Yes, sir.

“Q. And what percentage do you get off of the retail price?

“A. Thirty three percent.

“Q. So that if you bought a brand new fifty horse power electric motor at twelve hundred dol-

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lars, you, as a retailer, would be able to buy it at thirty three percent less?

“A. Right, sir.

“Q. Or approximately eight hundred dollars?

“A. Right, sir.

“Q. And the same is true if you purchased a twenty five horse power electric motor?

“A. Would be the same proceeding.

“Q. Now did you see the twenty five horse power motor that Mr. Hilger asked you about, asked you the questions about?

“A. No, sir.

“Q. Did you see the fifty horse power motor that Mr. Hilger asked you the questions about?

“A. No, sir, no, sir.

“Q. Do you know whether either one of those motors was in a runable condition?

“A. No, sir.

“Q. Do you know whether either one of those motors required repairs? “A. No, sir.

“Q. Do you know the condition of either one of those motors? “A. No, sir.

“Q. Were you asked to inspect either of those motors after the fire? “A. No, sir.

“Q. Did you inspect either one of those motors after the fire? “A. No, sir.” [292]

Mr. Hilger: At this time, we would read into evidence the deposition of Paul Henning taken in Eureka, California, on September 19, 1957.